UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/1993/28
28 July 1993

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Forty-fifth session
Item 14 of the provisional agenda

DISCRIMINATION AGAINST INDIGENOUS PEOPLES

Study on the protection of the cultural and intellectual property of indigenous peoples, by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations

GE.93-14368 (E)

CONTENTS

	Paragraphs	Page
Introduction	1 - 17	4
I. CONCEPTUAL FRAMEWORK OF THE STUDY	18 - 32	7
II. CONTEMPORARY ISSUES INVOLVING INDIGENOUS HERITAGE	33 - 117	10
A. Protection and use of sacred sites	36 - 43	10
B. Return and reburial of human remains	44 - 48	12
C. Recovery of sacred and ceremonial objects	49 - 57	14
D. Ensuring the authenticity of artworks	58 - 67	16
E. Communal rights to traditional designs	68 - 80	18
F. Issues in the performing arts	81 - 83	21
G. Breaches of confidentiality	84 - 86	21
H. Tourism and problems of privacy	87 - 89	22
I. Medical research and "bio-prospecting"	90 - 102	23
J. Indigenous science and technology	103 - 106	26
K. Community control of research	107 - 109	27
L. Professional organizations and ethics	110 - 114	27
M. Summary of major issues	115 - 117	29
III. INTERNATIONAL LEGAL INSTRUMENTS AND MECHANISMS	118 - 158	29
A. Human rights instruments	118 - 122	29
B. UNESCO machinery for recovering cultural property	123 - 127	30
C. Copyright of literary and artistic works	128 - 133	31
D. Patent protection for scientific discoveries	134 - 144	32
E. Trademark and industrial design protection	145 - 148	34
F. Special instruments concerned with indigenous peoples	149 - 151	35

CONTENTS (continued)

		Paragraphs	Page
G.	International trade and aid measures	152 - 153	36
H.	Private international law	154 - 158	37
IV.	CONCLUSIONS AND RECOMMENDATIONS	159 - 181	38
A.	Basis for action	159 - 163	38
B.	Basic principles	164 - 170	39
C.	Recognition of ownership	171 - 175	40
D.	Recovery of lost or dispersed heritage	176	41
E.	Prevention of further losses of heritage . . .	177 - 180	41
F.	Future role of the study	181	42

Annexes

I.	Case studies and documents	43
II.	Principle 67 of the UNESCO Declaration on the Principles of International Cultural Co-operation	51
Bibliography		54

Introduction

1. For indigenous peoples the world over, the protection of cultural and intellectual property has taken on growing importance and urgency. The very concept of "indigenous" embraces the notion of a distinct and separate culture and way of life, based upon long-held traditions and knowledge which are connected, fundamentally, to a specific territory. Indigenous peoples cannot survive, or exercise their fundamental human rights as distinct nations, societies and peoples, without the ability to conserve, revive, develop and teach the wisdom they have inherited from their ancestors.

2. In 1981, a conference was held at San José, Costa Rica, under the auspices of UNESCO to discuss the problems of ethnocide with particular reference to the indigenous peoples of the Americas. The participants agreed upon a statement of principles that reaffirmed, inter alia, the right of indigenous peoples to preserve and develop their own cultures and diverse cultural heritage. "The Declaration of San José", as this document came to be known, was the first official recognition, in the United Nations system, of the evil and continuing danger of ethnocide, and of the role Governments and intergovernmental institutions should play in preventing any further erosion of indigenous peoples' cultural and intellectual heritage.

3. The establishment of the Working Group on Indigenous Populations in 1982 has provided indigenous peoples with a forum to express their own views on this important topic, and, since its very first session, the Working Group has heard repeatedly from indigenous representatives from every continent about the priority and urgency they attach to the protection of their spiritual and cultural life, arts, and scientific and medical knowledge. These concerns are not only reflected in the reports of the Working Group's previous 10 sessions, but also in the fact that the draft Declaration on the rights of indigenous peoples contains specific provisions on ethnocide, cultural development, the protection of intellectual property, religious freedom, control of education, etc.

4. The protection of cultural and intellectual property is connected fundamentally with the realization of the territorial rights and self-determination of indigenous peoples. Traditional knowledge of values, autonomy or self-government, social organization, managing ecosystems, maintaining harmony among peoples and respecting the land is embedded in the arts, songs, poetry and literature which must be learned and renewed by each succeeding generation of indigenous children. These rich and varied expressions of the specific identity of each indigenous people provide the required information for maintaining, developing and, if necessary, restoring indigenous societies in all of their aspects.

5. This study was proposed by the Special Rapporteur and authorized by the United Nations competent bodies and the Economic and Social Council as a first formal step in responding to the concerns expressed by indigenous peoples themselves at the annual sessions of the Working Group and elsewhere in the United Nations system. It should provide a basis for appropriate standard-setting by the Working Group and other international bodies, as well as a number of specific institutional measures to provide indigenous peoples

with some immediate relief from the widespread and growing threats to the integrity of their cultural, spiritual, artistic, religious and scientific traditions.

Background and mandate of the study

6. In its resolution 1990/25 of 31 August 1990 the Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted Ms. Erica-Irene Daes with the preparation of a working paper on the question of the ownership and control of the cultural property of indigenous peoples, for submission to the Working Group on Indigenous Populations at its ninth session.

7. After considering, at its forty-third session, in 1991, the conclusions and recommendations contained in the working paper prepared by Ms. Daes (E/CN.4/Sub.2/1991/34), the Sub-Commission in resolution 1991/32 of 29 August 1991, expressed its appreciation to the author and decided to entrust her with the further task of preparing, for submission at its forty-fifth session in 1993, a study of measures which should be taken by the international community to strengthen respect for the cultural property of indigenous peoples.

8. At its forty-third session also, the Sub-Commission, in resolution 1991/31 of 29 August 1991, requested the Secretary-General to prepare a concise note on the extent to which indigenous peoples can utilize existing international standards and mechanisms for the protection of their intellectual property, drawing attention to any gaps or obstacles and to possible measures for addressing them.

9. At its forty-fourth session, in 1992, the Sub-Commission, welcoming the concise note of the Secretary-General on intellectual property (E/CN.4/Sub.2/1992/30), expressed the conviction, in its resolution 1992/35 of 27 August 1992, that

> "there is a relationship, in the laws or philosophies of indigenous peoples, between cultural property and intellectual property, and that the protection of both is essential to the indigenous peoples' cultural and economic survival and development".

The Sub-Commission recommended that the Special Rapporteur include a consideration of this relationship in her report, and recommended that the title of the study should be revised to "Protection of the cultural and intellectual property of indigenous peoples".

10. The Commission on Human Rights, in its decision 1992/114, entitled "Ownership and control of the cultural property of indigenous peoples", decided, without a vote, to recommend to the Economic and Social Council that it endorse the appointment of Ms. Erica-Irene A. Daes as Special Rapporteur of the Sub-Commission to prepare a study of measures which should be taken by the international community to strengthen respect for the cultural property of indigenous peoples, to be submitted to the Sub-Commission at its

forty-fifth session in 1993. The Economic and Social Council, in its decision 1992/256 of 20 July 1992, approved the appointment of Ms. Daes as Special Rapporteur.

11. In preparing this report the Special Rapporteur has taken account, inter alia, of the relationship between this study and the relevant activities of intergovernmental bodies, in particular the planned completion of the draft declaration on the rights of indigenous peoples by the Working Group on Indigenous populations at its eleventh session; the anticipated implementation, by the new United Nations Commission on Sustained Development, of the provisions of Agenda 21 (A/CONF.151/26/Rev.1, volume I) relating to indigenous peoples: and ongoing work by the Inter-American Commission on Human Rights on a possible inter-American legal instrument on the rights of indigenous peoples.

General information

12. A comprehensive global survey of problems and possible solutions was beyond the scope of this study, in view of the time and resources which were available to the Special Rapporteur. An effort was made to provide concrete illustrations of each issue, however, where data was available from reliable first-hand sources. Many additional examples, and perhaps better ones, unquestionably exist.

13. Most examples are referred to directly in the text of the study. Several interesting case studies are also set out at greater length as appendices, based on information provided to the Special Rapporteur by the indigenous peoples directly concerned.

14. The scope of direct consultations with indigenous organizations was severely limited because of lack of sufficient time and means. The Special Rapporteur was nevertheless fortunate to obtain detailed information directly from the following indigenous nations, peoples and organizations: Aboriginal and Torres Strait Islander Commission; Alaska Native Leadership Project; Colville Confederated Tribes; Hui Malama i na Kupuna o Hawai'i Nei; Kodiak Area Native Association; Navajo Nation Department of Justice; North Slope Borough Commission on Inupiat History, Language and Culture; Snoqualmie Tribe; and Pueblo of Zuni Archeology Programme.

15. The Special Rapporteur is also pleased to recognize the important contributions made by other organizations interested in the defence of indigenous rights, including the Alaska Legal Services Corporation; American Indian Ritual Object Repatriation Foundation; the Cultural Conservancy; Cultural Survival; the Rainforest Alliance; the World Resources Institute; and World Watch Institute. Appreciation is also due to the following corporations, for freely sharing information on their relevant research activities: Exxon Corp.; Merck & Co., Inc.; and Shaman Pharmaceuticals, Inc. Information on activities of the Society for Applied Anthropology and the Society for Economic Botany was supplied by Dr. Tom Greaves and Dr. Brian Boom, respectively.

16. The Special Rapporteur is also grateful for the cooperation of the Select Committee on Indian Affairs of the United States Senate, as well as the

following United States government agencies: Indian Arts and Craft Board (Department of Agriculture); National Cancer Institute, National Institutes of Health; National Germplasm Resources Laboratory (Department of Health); and National Park Service (Department of the Interior).

17. The Special Rapporteur gratefully acknowledges the assistance of Dr. Marie Battiste, an indigenous expert, and Apamuek Institute, a community research centre of the Mikmaq Nation, as well as research assistants Letitia Taylor, Raisa Lerner, and Rachel Stevens, and Amy Townshend of the Worldwide Fund for Nature, who helped compile a great number of relevant documents used in preparing this report.

I. CONCEPTUAL FRAMEWORK OF THE STUDY

18. European exploration and colonization of other regions beginning in the fifteenth century led to the rapid appropriation, by major European empires, of indigenous peoples' lands and natural resources. But this was not all that was taken. European empires also acquired knowledge of new food plants and medicines, including maize and potatoes, which made it possible to feed the growing urban concentrations of labourers needed to launch Europe's industrial revolution. As industrialization continued, European States turned to the acquisition of tribal art and the study of exotic cultures. Indigenous peoples were, in succession, despoiled of their lands, sciences, ideas, arts and cultures.

19. This process is being repeated today, in all parts of the world, as non-European States expand their activities into regions previously considered remote, inaccessible or worthless, such as deserts, Arctic tundra, mountain peaks, and rainforests. Ironically, publicity about the victimization of indigenous peoples in these newly-exploited areas has also renewed Europeans' interest in acquiring indigenous peoples' arts, cultures and sciences. Tourism in indigenous areas is growing, along with the commercialization of indigenous arts and the spoiling of archaeological sites and shrines.

20. At the same time, the "Green Revolution", biotechnology, and the demand for new medicines to combat cancer and AIDS are resulting in a renewed and intensified interest in collecting the medical, botanical and ecological knowledge of indigenous peoples. The fact that many of these peoples are in jeopardy has been advanced as a justification for acquiring their knowledge even more rapidly. There is an urgent need, then, for measures to enable indigenous peoples to retain control over their remaining cultural and intellectual, as well as natural, wealth, so that they have the possibility of survival and self-development.

21. In preparing this report, the Special Rapporteur was compelled to the conclusion that the distinction between cultural and intellectual property is, from indigenous peoples' viewpoint, an artificial one and not very useful. Industrialized societies tend to distinguish between art and science, or between creative inspiration and logical analysis. Indigenous peoples regard all products of the human mind and heart as interrelated, and as flowing from the same source: the relationships between the people and their land, their kinship with the other living creatures that share the land, and with the spirit world. Since the ultimate source of knowledge and creativity is the

land itself, all of the art and science of a specific people are manifestations of the same underlying relationships, and can be considered as manifestations of the people as a whole.

22. A song, for example, is not a "commodity", a "good," or a form of "property," but one of the manifestations of an ancient and continuing relationship between the people and their territory. Because it is an expression of a continuing relationship between the particular people and their territory, moreover, it is inconceivable that a song, or any other element of the people's collective identity, could be alienated permanently or completely.

23. For this reason, it is both simpler and more appropriate to refer to the collective "heritage" of each indigenous people, rather than make distinctions between "cultural property" and "intellectual property". Thus, for example, Cultural Heritage Act No. 3501 (1979) of Ecuador is applicable to everything that indigenous peoples themselves regard as "recurrent and valid means of expression and identification of their culture".

24. "Heritage" is everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples. It includes all of those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of the landscape, and naturally-occurring species of plants and animals with which a people has long been connected.

25. It is not only the ability to possess a distinct heritage, but to share some aspects of this heritage from time to time with others that gives to each indigenous people its own dignity and value. As long as heritage remains within the control of a people, it can continue to be shared at appropriate times and in appropriate ways. For example, the indigenous peoples of the Pacific north-west coast in North America are harvesters of the sea. Each clan or community is or has been associated, for centuries, with the sub-species (or "runs") of salmon which return annually to its territory and are viewed as its kinfolk. The dignity and honour of each community depends on the ability to hold feasts and share these fish with others, which in turn depends on wise management of the ecosystem. Salmon is a major part of these peoples' heritage, not just in the eating or trading of salmon, but in the sharing, which would come to an end if particular sub-species of salmon disappeared. The songs, stories, designs, artworks and ecological wisdom connected with salmon are all interrelated elements of this same heritage.

26. Indeed, indigenous peoples do not view their heritage in terms of property at all - that is, something which has an owner and is used for the purpose of extracting economic benefits - but in terms of community and individual responsibility. Possessing a song, story or medicinal knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places with which the song, story or medicine is connected. For indigenous peoples, heritage is a bundle of relationships, rather than a bundle of economic rights. The "object" has no meaning outside of the relationship, whether it

is a physical object such as a sacred site or ceremonial tool, or an intangible such as a song or story. To sell it is necessarily to bring the relationship to an end.

27. Indigenous peoples have always had their own laws and procedures for protecting their heritage and for determining when and with whom their heritage can be shared. The rules can be complex and they vary greatly among different indigenous peoples. To describe these rules thoroughly would be an almost impossible task; in any case, each indigenous people must remain free to interpret its own system of laws, as it understands them. There appear to be similarities in the structure of indigenous peoples' legal systems, however, which can be summarized here.

28. Heritage is ordinarily a communal right, and is associated with a family, clan, tribe or other kinship group. Only the group as a whole can consent to the sharing of heritage, and its consent must be given through specific decision-making procedures, which may differ depending on whether songs, stories, medicines or some other aspect of heritage is involved. In whatever way consent is given, it is always temporary and revocable: heritage can never be alienated, surrendered or sold, except for conditional use. Sharing therefore creates a relationship between the givers and receivers of knowledge. The givers retain the authority to ensure that knowledge is used properly and the receivers continue to recognize and repay the gift.

29. Although heritage is communal, there is usually an individual who can best be described as a custodian or caretaker of each song, story, name, medicine, sacred place and other aspect of a people's heritage. Such individual responsibilities should not be confused with ownership or property rights. Traditional custodians serve as trustees for the interests of the community as a whole and they enjoy their privileges and status in this respect for only so long as they continue to act in the best interests of the community.

30. In summary, then, each indigenous community must retain permanent control over all elements of its own heritage. It may share the right to enjoy and use certain elements of its heritage, under its own laws and procedures, but always reserves a perpetual right to determine how shared knowledge is used. This continuing, collective right to manage heritage is critical to the identity, survival and development of each indigenous society.

31. It is thus also inappropriate to try to subdivide the heritage of indigenous peoples into separate legal categories such as "cultural", "artistic" or "intellectual", or into separate elements such as songs, stories, science or sacred sites. This would imply giving different levels of protection to different elements of heritage. All elements of heritage should be managed and protected as a single, interrelated and integrated whole.

32. Above all, it is clear that existing forms of legal protection of cultural and intellectual property, such as copyright and patent, are not only inadequate for the protection of indigenous peoples' heritage but inherently unsuitable. Existing legal measures provide protection of limited duration, and are designed to promote the dissemination and use of ideas through

licensing or sale. Subjecting indigenous peoples to such a legal scheme would have the same effect on their identities, as the individualization of land ownership, in many countries, has had on their territories - that is, fragmentation into pieces, and the sale of the pieces, until nothing remains.

II. CONTEMPORARY ISSUES INVOLVING INDIGENOUS HERITAGE

33. Perhaps the most comprehensive legislative scheme for protection of indigenous heritage can be found in the United States, where there are laws protecting indigenous peoples' rights to ceremonial objects, human remains, the use of traditional religious sites and exclusive marketing of artworks and crafts as "Indian" products. These include the Native American Graves Protection and Repatriation Act (NAGPRA) of 1990, which applies to human remains and culturally-important objects, and the National Museum of the American Indian Act of 1991, by which a majority of relevant collections in the national museum are placed in a new museum, managed by a committee of indigenous people appointed by the President. Nevertheless, problems involving the heritage of United States indigenous peoples continue to arise and the United States continues to be one of the world's largest consumers of the heritage of indigenous peoples from other regions. Accordingly, the United States has provided a rich source of illustrations for the evaluation of heritage-protection measures.

34. In Australia, The Aboriginal and Torres Strait Islander Heritage Act 1984 provides that the Minister for Aboriginal Affairs, on request by Aboriginal people, may declare that a particular site or object is protected as part of Australia's Aboriginal heritage. In 1987, a much stronger measure was adopted with respect to the state of Victoria in South-eastern Australia, under which Aboriginal communities in Victoria may request the Minister to protect any "Aboriginal cultural property" and, if the Minster declines, the matter is submitted to arbitration. This covers not only sites and objects, but also "folklore", which is defined as including songs, rituals, ceremonies, dances, art, customs and spiritual beliefs. Accordingly, Australia has also provided a rich source of illustrations and analysis for this study.

35. The following examples of current issues in the protection of the heritage of indigenous peoples have been selected and organized with a view to illustrating the variety of issues that should be addressed by national and international measures. This includes some discussion of existing measures at the national level in the United States, Australia and a number of other countries. The applicability of current international standards and mechanisms to these issues is addressed in Section III of this report.

A. Protection and use of sacred sites

36. Most countries have adopted procedures for the identification of historically and culturally important places. Such laws are not always applied consistently to sites of interest to indigenous peoples, and often do not prevent the Government itself from disposing of sites or developing them for other purposes.

37. In the United States, for example, protection can be given to buildings, groups of buildings, landscapes and landforms which were associated with important historical events or historically-significant persons, which have the potential of yielding important historical information, or which represent a characteristic type of historical human activity or environment. This may include locations where indigenous peoples gathered foods or medicines, and religious practices. In determining whether a site is important, government agencies are advised to consult directly with indigenous peoples. They are also advised to respect indigenous peoples' desire for confidentiality, for example where a site has been associated with traditional spiritual teachings.

38. Many government agencies routinely collaborate with indigenous religious leaders in the protection and interpretation of significant sites. One current collaboration involves the protection of the site at Wounded Knee, South Dakota, where in 1890 the Seventh US Cavalry surrounded and killed more than 250 Lakota (Sioux) people. Considered a sacred place by descendants of those who died there, Wounded Knee is likely to be set aside as a special historical site under the control of the Oglala Sioux tribe and Cheyenne River Sioux tribe, with federal funding and legal protection. Management plans were devised by a team of historians and related experts from both the National Park Service and the two tribes. They recommended that the site be used "to foster a deeper understanding of Lakota history and culture", and to promote "healing between the Lakota and white societies". All of the markers and guidebooks will be bilingual and "from the Lakota point of view", according to the United States National Park Service (1993) (p. 63).

39. In the case of Fools Crow v. Gullet (1982) in the United States, Lakota (Sioux) elders complained that the development of their most sacred mountain, Bear Butte in South Dakota, as a public park would desecrate the site and lead to the exploitation of their religious practices as a tourist attraction. Tourists had already begun to interrupt some ceremonies and disturb the privacy of individual Lakota who were seeking visions in remote parts of the mountain. A federal court rejected these claims, stating that interference from tourists would not be an insurmountable obstacle to the continued ceremonial use of Bear Butte. Lakota continue to use the mountain within site of trails and parking lots built for tourists.

40. The Bear Butte dispute was only one of several cases since 1980 in which United States courts refused to protect indigenous peoples' ceremonial sites on government-owned land from development projects. Sequoyah v. Tennessee Valley Authority (1980) involved the flooding of the ancient capital city of the Cherokee nation by a hydroelectric power project. In Badoni v. Higginson (1980), Navajo elders tried to prevent Rainbow Bridge, a unique natural feature long used as a ceremonial site, from being opened to tourism. In Wilson v. Block (1983), Hopi elders tried unsuccessfully to block the construction of a ski resort on a sacred mountain and, finally in Lyng v. Northwest Indian Cemetery Protective Association (1988), the Supreme Court allowed the disturbance of Hoopa ceremonial sites in California by the construction of logging roads. The Supreme Court reasoned that the Government had a right to do whatever it wished with public property, even when that appeared to conflict with the guarantee of the "free exercise of religion" in the United States constitution.

41. Vecsey, Handbook of American Indian Religious Freedom (1991), pp. 108-110, lists 30 mountains, lakes, artificial mounds and petroglyphs in the United States which are considered sacred by various indigenous peoples. The total number of United States sites which may still be in ceremonial use or of great cultural importance could be as high as 300. A large number of these sites are already set aside for public use as parks, but few have arrangements to ensure their continued cultured integrity and use by indigenous peoples. Others, like Snoqualmie Falls (Appendix C), are threatened by industrial activities.

42. The United States Congress is considering amendments to the 1978 American Indian Religious Freedom Act (AIRFA) that would help protect rights of access to, and use of, "religious sites" on lands owned by the federal Government. Government agencies would be required to minimize adverse impact of their activities on such sites. They would be required to notify indigenous religious leaders of proposed government activities and consult with them in preparing written assessments of the impact. Indigenous peoples would be able to challenge government activities in federal courts and require that information obtained from religious leaders remain confidential. "Religious sites" would include places which indigenous peoples consider sacred, places which are used to gather materials used in ceremonies and places where ceremonies are conducted. It should be noted that this draft legislation would allow government officials to determine which groups are indigenous, and are therefore entitled to protection.

43. There has also been considerable activity in Australia concerning the identification and protection of indigenous peoples' sacred sites, also with mixed results. The decision of the Australian Government to place Uluru National Park (Ayres Rock) under Aboriginal management and control was widely publicized. A great many other important sites are still in need of protection, chiefly those on lands owned or leased by mining companies, to which existing legislative measures do not apply. The Argyle diamond mine in Western Australia is a notable example of a failure to involve Aboriginal people in decision making on development with consequences for Aboriginal heritage. It is likely that all large-scale development projects, such as hydroelectric dams, mining, and logging, affect sacred and ceremonial sites.

B. Return and reburial of human remains

44. As a general rule, national legal systems treat anything found in the soil as belonging either to the government, or to the owner of the land. This permitted archaeologists and other individuals for example in the United States to acquire ownership of skeletons and other materials found in graves of indigenous people, which were typically not legally designated and protected as "cemeteries". In 1986, however, a court in the state of Louisiana decided that the contents of several graves of Tunica-Biloxi Indians belonged to the surviving members of that tribe (Charrier v. Bell). The court reasoned that burial does not amount to an intention to abandon rights to the body and objects buried with it. Whether the community retains rights to their grave after burial must be determined by the cultures and customs of the people. The Tunica-Biloxi showed that they had maintained a cultural and religious attachment to their grave sites, long after any external markings had disappeared. Several other states of the United States have now adopted

laws protecting indigenous graves and, as noted earlier, the national Government has enacted the Native Graves Protection and Repatriation Act (NAGPRA).

45. Under NAGPRA, all museums and other institutions owned, or funded by the federal Government must conduct inventories of the indigenous human remains in their collections and notify the relevant indigenous peoples. Human remains must be returned upon demand to any modern-day group which is "culturally affiliated" with them. Any human remains, grave objects, "sacred objects", or objects having ongoing cultural or historical importance, which may be discovered on government lands in the future, are declared to belong to the modern-day indigenous group which is "culturally affiliated" with them. The meaning of "cultural affiliation" is still under discussion between indigenous leaders and government officials. A definition proposed by government officials in October 1992 would require proof of kinship and cultural "identity" and, in the event of competing claims by two present-day groups, would award custody of objects to the group with the "closest" cultural ties to them. Since United States policies aggressively relocated and consolidated tribes up to the 1880s, tracing these connections between nineteenth-century and twentieth-century groups will undoubtedly be very complicated.

46. According to reports prepared by the United States Congress, the remains of thousands of indigenous people have been stored in the collections of museums and scientific institutions. About 18,500 individuals were found in the collection of the Smithsonian Institution alone.

47. The indigenous Alutiiq people of Larsen Bay, Alaska, discovered the remains of 756 individuals from their area at the Smithsonian, and with the assistance of the Native American Rights Fund, an indigenous-controlled legal services organization, waged a two-year struggle with museum officials for their return. The Larsen Bay skeletons had been excavated in the 1920s and 1930s by Ales Hrdlicka, already famous for his publications on American Indian physiology; some of the graves he opened were only 10 to 20 years old, according to village elders. Museum officials resisted returning the remains, arguing that they were much too old to be traced reliably to present-day Alutiiq. Even after they agreed to return the remains, museum officials argued that they should be preserved in a museum in Alaska, rather than reburied. The Alutiiq eventually prevailed, and reburied the remains in 1991, but only at an estimated cost of over $US 100,000 to prove their claims.

48. The collecting of indigenous peoples' human remains was popular for many years in North America, and large numbers of human skulls and other materials still remain in private hands. For example, in 1908 a gold miner removed two "mummies" from Inupiat territory in Alaska and displayed them for many years as part of a travelling curiosity show. Earlier this year, the family of this man contacted Inupiat community leaders through the Cincinnati Museum of Natural History and returned the two bodies for reburial at Barrow, Alaska, in accordance with the beliefs of Inupiat people. A Pawnee burial area near Salina, Kansas was excavated in the 1930s and the skeletons were displayed as a local tourist attraction until 1989, when Pawnee leaders succeeded in having the graves closed. Hundreds of other Pawnee skeletons were recovered from the Nebraska State Historical Society. In such cases, NAGPRA can provide little

assistance. It also has proven ineffective in cases of removal of human remains to other countries (Appendix I, Section B).

C. Recovery of sacred and ceremonial objects

49. In addition to the systematic unlawful "mining" of archaeological sites for marketable antiquities, indigenous peoples must contend with continuing efforts by tourists, art dealers and scholars to purchase culturally-important objects which are still in use. Poverty, ignorance and loss of land rights are key factors in this illicit trade, since indigenous peoples stripped of their ability to subsist by their own means may be reduced to selling their heritage. Indigenous peoples' own customary laws ordinarily forbid the sale of such objects by individuals but, as the case of the Whale House (Annex I, Section A) illustrates, it is difficult and costly to locate and recover objects once they have been taken out of the community. A number of countries have enacted laws prohibiting exports of indigenous peoples' heritage, including Australia's Movable Cultural Property Act 1986, but they have not always been effective.

50. Aymara people of Coroma, Bolivia recently succeeded in arranging for the recovery of q'epis, bundles of sacred garments that document the spiritual origins and histories of particular Aymara communities and embody the spirits of their ancestors (Lobo 1991). By tradition, the responsibility for caring for each bundle rotates among families, although their ownership is communal. In the late 1970s, a number of these centuries-old sacred garments disappeared - apparently sold, by individuals, to North American art dealers. An anthropologist later learned that some of these garments were about to be offered for sale in San Francisco. He alerted the Coroma, who sent representatives to the United States. With support from the Government of Bolivia, they convinced United States officials to confiscate the stolen q'epis and, in 1989, to impose emergency import restrictions on all Coroma textiles.

51. In the case of the Coroma textiles, both the United States and Bolivia are parties to the UNESCO conventions on cultural property; article 191 of the Bolivian Constitution forbids the export of cultural property and the Government of Bolivia supported the efforts of the Coroma people. This was a fortunate, but rare situation in which there were adequate legal mechanisms in both States and a spirit of cooperation between the States concerned. It was also fortunate that the people were able to discover, by mere accident, where their sacred objects had been taken. On the other hand, while the Coroma were able to put a stop to further imports of q'epis to the United States by these means, they had to file claims in United States courts to prove their ownership and recover the possession of individual q'epis, a lengthy and costly process.

52. Objects of great religious and cultural importance continue to be discovered in museum collections. More than 10 years ago, chiefs of the Six Nations Iroquois Confederacy discovered that several wampum belts, which had been confiscated from their communities in the 1920s by Canadian police, were in the collection of the Heye Foundation, a private ethnographic museum in New York City. These objects, made of strung blue and white shell beads, are irreplaceable documents of the constitutional and diplomatic history of

the Six Nations. After years of negotiations and threats of legal and political action, the museum agreed to return the belts to Six Nations chiefs in Canada.

53. The Mikmaq people of eastern Canada have not been so fortunate: a large Mikmaq wampum belt, recording a 1610 treaty with the Holy See, was photographed on display in the Vatican ethnographic museum earlier this century. The Vatican today denies any knowledge of this object. A complete and unique Lakota Sioux ceremonial tepee from the 1840s is still in storage at the Museum für Volkerkunde in Berlin, where it was discovered by Lakota visitors in 1981. The sacred ceremonial bundles of the Crow, Sac and Fox peoples, obtained by anthropologists around 1915, are still in United States museums. Hundreds of equally significant sacred objects from the United States alone are scattered worldwide. The Lakota have begun a global inventory of their dispersed cultural property and have found objects in museums in nearly every industrialized country. The people of Kodiak Island have discovered most of their lost objects in Russia.

54. The American Indian Ritual Object Repatriation Foundation is one example of an organization established to educate the public about the importance of returning sacred objects, and to facilitate negotiations for the return of particular objects - especially objects from private collections, which are not covered by NAGPRA. Its founder, Elizabeth Sackler, attracted considerable publicity in 1991 by purchasing sacred Hopi masks at a Sotheby's auction in New York, and then returning them to Hopi elders.

55. One frequent issue in repatriation is identifying the appropriate community or religious leader to whom an object should be returned. A Hopi ceremonial shield was discovered by Hopi religious leaders during a visit to the Heard Museum in Phoenix in 1990. They convinced museum officials that the shield, originally sold by a Hopi man in the 1970s, was an object of ceremonial importance, had been communally owned, and could not have been lawfully sold by an individual. The museum agreed to return the shield, but the Hopi kiva to which it had traditionally belonged had meanwhile divided into two new sects. This left the Hopi Tribal Council to consult with both groups, and reach an agreement on which of them would take custody of the shield. In April 1992, it was agreed that the Coyote Clan of the village of Oraibi would be the new custodian of the shield, and it was returned.

56. All objects are not necessarily of great cultural importance and many objects, for whatever reason, will continue to be acquired, owned and displayed by museums. In such instances, indigenous peoples claim an interest in determining how these objects are interpreted. Museums are a major factor in forming public perceptions of the nature, value and contemporary vitality of indigenous cultures. Indigenous peoples rightly believe that museum collections and displays should be used to strengthen respect for their identity and cultures, rather than being used to justify colonialism or dispossession.

57. A related issue has been the right to harvest and use ceremonial materials, such as medicinal plants and feathers. In the United States, there has already been considerable litigation over the right of Indians to obtain feathers from bald eagles, which are a protected species, or to use peyote,

which the United States laws classify as a dangerous narcotic drug. In both of these cases, the solution thus far has been to make a special, legislated exception in favour of indigenous cultural practices. United States courts have generally agreed that these exceptions are not required by the constitutional guarantee of "free exercise of religion", however. Similar problems will arise in the Andean countries, for example, with respect to indigenous peoples' traditional medicinal and social use of coca, and in Amazonia with respect to ceremonial uses of feathers from increasingly scarce species of birds. Indigenous peoples insist that their enjoyment of religious and cultural integrity takes priority over commercial and recreational uses of wildlife by others.

D. Ensuring the authenticity of artworks

58. The increasing worldwide popularity of indigenous peoples' arts and cultures poses a growing challenge to indigenous peoples' ability to interpret their own cultures, defend the integrity of their cultures and, if they wish, receive fair and just compensation from the use and enjoyment of their cultural manifestations by others.

59. The size of this market is suggested by The Aboriginal Arts and Crafts Industry, a 1989 report by Australia's Department of Aboriginal Affairs. Retail sales of Australian Aboriginal art alone totalled $A 18.5 million (US$ 12.8 million) in 1988 and involved 5,000 Aboriginal artisans. This is probably a very small percentage of the total world trade in indigenous peoples' products.

60. This trade is dominated by large-scale importers, including a new generation of "show-room" importers, such as Pier One and Cost Plus in the United States, which sell handicrafts in their own chains of retail stores. These importers retail handicrafts at three to seven times the prices they pay to the producers. Indigenous peoples' crafts are also marketed by a small number of non-governmental organizations, as a way of supporting indigenous development. Non-governmental organizations pay more to the producers, but account for only about 10 per cent of all handicraft sales. One reason producer prices remain so low is the ease with which these handicrafts can be copied.

61. A number of distinctively patterned textiles, such as ikat cloth from Sulawesi and Zapotec rugs from Mexico have obtained large markets in industrialized countries. These items can easily be reproduced at lower cost on machines, however, and when produced in large quantities they quickly lose their novelty and commercial value. For example, a small development project funded in part by the International Labour Organisation and by COTESU, the Swiss development agency, has restored traditional weaving among the Jalqu'a people of Bolivia and employs several hundred weavers in producing textiles sold in tourist markets within the country. Organizers of the project are reluctant to expand overseas for fear of losing control of the designs to mass production enterprises (Healy 1992). Legal protection of textile patterns would greatly expand the markets for such products of indigenous peoples and protect them from reproduction.

62. In the 1970s, the Government of Canada encouraged Inuit artists to organize community cooperatives, to adopt distinctive trademarks for Inuit products and to ensure their authenticity. This has played an important role in marketing stencilled prints, which have increased greatly in popularity and value since Inuit first experimented with this artistic medium more than 20 years ago. The artists in each cooperative decide annually on a limited number of prints to produce and sell. Only a fixed number of copies are made, and they are marked and numbered. In this way, Inuit artists have avoided problems of low prices and poor quality associated with mass production. By contrast, Navajo and Hopi silversmiths in the United States enjoyed a brief prosperity in the 1970s, until the market was flooded with inexpensive, poor quality work and imitations.

63. The Aboriginal Arts Management Association (AAMA) in Australia is currently developing a labelling scheme to ensure the authenticity of Aboriginal products and products which incorporate Aboriginal motifs. It also serves as a central agent for Aboriginal artists in copyright matters, including taking legal action for infringement.

64. In the United States, the Indian Arts and Crafts Board was established in 1935 to promote and market indigenous products. In 1990, new federal legislation authorized the Board to register trademarks for individual artists, as well as tribes and indigenous organizations, and made it a crime to sell a product as "Indian" unless it was actually produced by a member of an Indian tribe recognized as such by the United States Government. Although this new law provides important additional protection for indigenous artists, it has been criticized by some tribes for excluding, as it is asserted, the more than 100 Indian tribes and groups that currently are not recognized by the Government. Artists, who are members of these groups can be sentenced to prison for identifying their artworks as "Indian".

65. A related issue is access to, or control over the materials which traditionally are used in producing culturally-important objects. For example, traditional basketmakers among the Karuk people in California have complained that pollution is destroying the wild grasses they use to weave their baskets. Without access to these plants, their baskets cannot be authentic and lose both their cultural and commercial value. Similarly, the soft red stone that American Indians have long used for making ceremonial pipes comes from a single quarry in Minnesota. United States law protects this site, and in principle only indigenous craftsmen are entitled to use it. Recent consumer interest in Indian pipes has led to the sale of many reproductions, however.

66. When large quantities of goods are demanded by Western consumers, there is a tendency for indigenous peoples to devise special products which are easier to manufacture than traditional objects, and appeal more to Western tastes. The carving of soapstone and argillite among the Inuit people of Alaska and Arctic Canada began as an export industry in the 1880s. This fact should not be used to deny the Inuit legal protection, however. Cultures change and develop over time, and new motifs which are distinctive, and represent collective expressions of an indigenous people, are just as valid as pre-colonial ones.

67. It has been observed that many art forms regarded as "traditional" are in actuality the result of recent demands for indigenous art works by tourists and museums. As Roger Neich of the National Museum of New Zealand (Aoteoroa) has argued, this kind of patronage tends to select particular artistic styles and media, resulting in an "orthodoxy" that can stifle the natural creative growth of indigenous cultures. On the other hand, many indigenous artists in the Pacific north-west of the United States and Canada believe that recent recognition of their works as "high" art, rather than merely folk-crafts or curiosities, has helped revitalize their peoples' traditions and economies.

E. Communal rights to traditional designs

68. An emerging complication is the incorporation of traditional art images and designs into "modern" artworks, both by indigenous and non-indigenous artists. Some indigenous artists complain that their works are only taken seriously if they contain "traditional" motifs or media such as wood and feathers. Indeed, a group of American Indian artists who largely use Western media displayed their works at the Palais des Nations in 1984 under the title "No beads - No trinkets", to make this point. On the other hand, the use of traditional motifs may be viewed as undermining the integrity of the culture, particularly if used by a non-indigenous artist. A 1988 "round table on copyright" of Aboriginal Australian artists, writers and actors complained that non-Aboriginals were taking the initiative in utilizing Aboriginal motifs and themes, often resulting in misinterpretations and negative stereotypes.

69. When objects are associated with individual artists, they tend to be accorded greater value and are more easily given legal protection, as the individual property of the artist. However, indigenous peoples may view the individual's role in art quite differently. For example, distinctive pottery has long been made and exported by Pueblo women in the United States, and by Quichua women in Ecuador. In both cultures, potters' styles fit within recognizable traditional boundaries, but the images they sculpt or paint are highly individualized. Hence, there are both group and individual interests in protecting these products' artistic merit and commercial value.

70. The 1989 report of a committee appointed to review the Aboriginal Australian arts and crafts industry contains a valuable discussion of these issues. It notes that sale of an artwork does not, in the view of Aboriginal people, terminate the interests of the communities whose traditional motifs have been employed by the artist, and stresses that existing copyright laws do not recognize such community rights. Droit moral may be invoked to demand correct identification of the creators of particular works, and the protection of works from inappropriate or degrading uses, such as the public display of sacred objects, but does not protect the economic interests of the artists or ensure that only authentic, high-quality works are offered for sale. The best means of securing all the rights of Aboriginal people, the committee concluded, was through support of community controlled cultural institutions and the financing of local artists' organizations. "Cultural autonomy is integral to the future viability of the industry."

71. In Yumbulul v. Reserve Bank of Australia (1991), an individual Aboriginal artist complained that the national bank had reproduced one of his artworks on 10-dollar banknotes without permission. While the artist himself had

signed a document authorizing reproduction, he said that approval was also required, under customary laws, from the elders of the Galpu people, to whom the underlying motif belonged. This case was eventually settled out of court, but the judge commented that the rights of the community, as opposed to those of the individual artist, did not appear to be adequately protected. At least in land disputes, however, Australia's High Court has recognized tribal elders as legal custodians who can launch court action on behalf of their communities (Onus v. Alcoa of Australia Ltd. (1981)).

72. A number of cases involving reproductions of Aboriginal art have successfully been taken to Australian courts by individual artists, as for example in the 1989 case of Bulun Bulun v. Nejlam Pty. Ltd., which involved the unauthorized printing of an Aboriginal painter's works on commercially manufactured T-shirts. The proceedings were settled out of court and a sum of approximately $A 150,000 was paid to the artists by way of compensation for damage to them and for their costs. Litigation is expensive, however, and government assistance for legal services is inadequate. There has been a tendency to try to settle matters by negotiation, as in the above-mentioned case. In particular, many disputes are settled by negotiation when the dispute is among Aboriginal people themselves, for example, a 1988 case in which the Tiwi Land Council objected to the depiction of Tiwi burial poles in the works of an Aboriginal artist from Sydney.

73. Another case involving issues of copyright and cultural heritage was brought by Terry Yumbulul, an artist who brought proceedings about the reproduction of his ceremonial "Morning Star Pole" on the plastic commemorative 1988 10-dollar note. This action was brought against the Reserve Bank of Australia and an agent who negotiated the arrangements, Anthony Wallis, as well as his company Aboriginal Artists Agency Limited (Yumbulul v. Reserve Bank of Australia).

74. The Reserve Bank relied on an agreement entered into between the applicant and the agent whereby permission to reproduce the "Morning Star Pole" was obtained. Nevertheless, the Reserve Bank settled the dispute with the applicant by agreement, which involved the payment of a sum of money without admission of liability. The action continued between the applicant and the agent, but was dismissed in the Federal Court in Darwin following the hearing of the matter (1991) (21 IPR 481).

75. The decision is of particular interest as the court indicated that it was concerned that the traditional Aboriginal rights attaching to the reproduction of the art work were not protected under existing law.

76. French J. addressed the matter in relation to the defence sought to be relied upon by the agent that the reproduction in question was permitted under statute because of the provisions in sections 65 and 68 of the Copyright Act. These sections permit the reproduction of a sculpture which is on permanent public display. In this case, the artistic work was a pole which was on permanent public display in the Australian Museum in Sydney. It was argued by the applicant that the pole was not a sculpture. Whilst the judge did not decide the question, he said that if the agent's view of sections 65 and 68 were correct:

> "then it may be the case that some Aboriginal artist laboured under a serious misapprehension as to the effect of public display upon their copyright in certain classes of works. This question and the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators".

77. The issue of the rights of tribal owners of designs arose in the Yumbulul case because it was said by the applicant that the right to permit the reproduction of the "Morning Star Pole" rested with the tribal owners of the rights, the elders of the Galpu clan in north-east Arnhem Land, and not himself as a creator and copyright owner of the pole. Thus, it was acknowledged by the applicant that the permission to reproduce the "Morning Star Pole" had to be obtained from the relevant tribal owners. The applicant said that he was not able to give this permission and that, to the extent that the agreement he signed gave such permission, he had not appreciated that this was the case.

78. The problem demonstrates a fundamental difference in approach between the ownership of rights in artistic works as the notion is understood under the Copyright Act, being founded on the notion of the individual creator of a copyright interest having a property right in such interest, and the notion of the ownership of rights in Aboriginal law, being based on collective rights which are managed on a custodial basis according to Aboriginal tradition. Under Aboriginal law, the rights in artistic works are owned collectively. Only certain artists are permitted within a tribe to depict certain designs, with such rights being based on status within a tribe. The right to depict a design does not mean that the artist may permit the reproduction of a design. This right to reproduce or redepict would depend on permission being granted by the tribal owners of the rights in the design.

79. Applying copyright principles to the problem, it may be said that the tribal owners of designs have an equitable interest in the copyright in such designs in so far as they, and not the legal owner of copyright per se, have the right to permit the reproduction of such designs or refuse permission. The tribal owners of rights do not have a legal interest in copyright in the absence of an assignment of copyright from the copyright owner to the tribal owners pursuant to the provisions of section 196 of the Copyright Act which requires that any assignment be in writing (See Colin Golvan, Intellectual Property Law, The Federation Press, 1992, pp. 51-53).

80. The complexity of providing protection for designs is discussed by Kenneth Maddock (1988), in connection with Aboriginal Australians' practice of body-painting. Some designs are in widespread use, while others have recognized creators and their use is restricted to the initiated men who have purchased the right to wear them. The extent to which a particular motif can be used or reproduced is a matter of local customary law, as well as the history of the particular design, and the agreement which was made between its creator and first owner. Maddock concludes that no one general rule could be formulated for all Aboriginal designs. What this demonstrates, moreover, is the need to empower indigenous peoples themselves, through their own institutions and representatives, to interpret and enforce their own laws relating to the disposition of their heritage.

F. Issues in the performing arts

81. While these concerns are most frequently expressed with regard to objects, they are also applicable to the performing arts. Traditional Balinese dance and rituals have reportedly been "edited" for tourists, for example, and in the 1970s a wave of tourist interest in the Toraja people of nearby Sulawesi has been accused of transforming traditional Toraja funerals into spiritually empty commercial spectacles. Popular interest in indigenous cultures has also led to greater incorporation of elements of traditional music and dance into works produced, and in many instances copyrighted, by non-indigenous performers.

82. There is reportedly a growing problem with the unauthorized sale of music recorded in indigenous communities. Commercial distributors of such recordings generally assume that because traditional songs are old, no royalties need be paid. Non-indigenous performers frequently make modifications in traditional melodies, moreover, so that they can be copyrighted as "new" or "original" works (Seeger 1991). Amazonian music has become particularly popular in recent years, but indigenous peoples have rarely received any compensation for this. A commendable exception was the album "Txai" by Milton Nascimento, based on indigenous Amazonian music, which was sold to raise funding for the promotion of indigenous rights under an arrangement with Brazil's Uniao das Nacoes Indigenas. There are also reports of a growing problem with pirating of the traditional songs of the Mbuti ("pygmies") of central Africa.

83. Indigenous peoples' customary laws regarding rights to music can be complex and differ considerably from national laws. Among the Suya people of Brazil, for instance, both the individual composer and the singer who gives a song its first public debut have rights to its use. In addition, songs associated with ceremonies are controlled by clans (Seeger 1991). Among Salish people in the Pacific Northwest region of North America, songs belong to lineages, but in each generation a song may be sung only by a single individual who has been given this right; personal names are also passed down from generation to generation in this manner.

G. Breaches of confidentiality

84. Access to sacred knowledge is ordinarily restricted to particular individuals and organizations within the community, such as initiated men or women, or the members of special religious societies. This can pose two kinds of problems. No single individual can ever be aware of all of the cultural concerns that may exist in the community; a broad process of consultation with different groups and elders may be needed before determining whether a site, object or design is important. In addition, the necessary information may be confidential, such that it cannot be revealed completely to outsiders or even to the rest of the community.

85. The Pueblo of Zuni in the United States has struggled with these problems. Spiritual knowledge among the Zuni people is divided among 6 kivas, 14 medicine societies, and a number of clans, priesthoods and individual specialists. "Thus, for example", explains Andrew Othole, a Zuni cultural protection officer, "the rain priests all have general knowledge of water and

water sources, but specialized knowledge of water and water sources in different geographic areas is divided among them". In order to be capable of responding promptly and accurately to government development plans affecting their territory, the Zuni held a meeting of their religious leaders and agreed to form a committee of six key leaders to serve as an advisory group and intermediary. This ensures that all appropriate elders are contacted before a decision is made. Unfortunately, there are still instances in which the Zuni are consulted about the possible adverse impact of a government project and "decide that it is more culturally appropriate to say nothing and risk the destruction" of the site, than to reveal its religious nature and location.

86. An interesting Australian court decision in this regard is Foster v. Mountford (1976), which barred the sale of a book containing sacred knowledge which had been shared by elders, in confidence, with a well-known anthropologist. It was argued that the anthropologist was aware of the restricted nature of the information when he received it, since he had studied the people concerned for many years. In other cases it might be difficult to establish the restricted nature of information, without the evidence of some kind of written agreement.

H. Tourism and problems of privacy

87. There continue to be some instances of the involuntary display of indigenous peoples and their communities as a tourist attraction. The public display of indigenous peoples at Western zoos and international exhibitions was commonplace a century ago. Like the reported display of tribal peoples to tourists in some South-East Asian countries today, these activities may involve covert forms of coercion, and are likely to continue so long as indigenous peoples lack complete freedom under law and access to their own means of subsistence and development.

88. Many countries feature indigenous peoples in advertising designed to attract tourists from overseas, without consulting with the peoples themselves or providing them with the legal or institutional means to control or reap benefit from increased tourist flows. This is the case in Australia, Canada, the United States, Indonesia and most Central American and Andean countries, including Guatemala, where, ironically, the promotion of Maya culture to tourists, and violence against Maya people continue side by side.

89. Cultural integrity also means that degrading commercial images of indigenous peoples should be prohibited. There have been a number of recent instances in both the United States and Canada, where indigenous peoples have successfully protested the use of "Indian" caricatures as mascots or emblems of sports teams, with names like "Redskins", or "warriors". United States automobile manufacturers continue to market trucks under the names of indigenous peoples (for example, "Cherokee"), however, and Indian symbols continue to be used in selling many other products as well. The right to cultural autonomy and integrity should include the right to respect for one's own name.

I. Medical research and "bio-prospecting"

90. Although many important medicines have been discovered in naturally occurring plants and micro-organisms, finding medicines in nature "is extremely difficult and unpredictable", according to biochemist Georg Albers-Schonberg. Hundreds of thousands of species remain unstudied, so the selection of species for study is critical. Random screening of species, like the random screening of synthetic compounds, can be extremely time-consuming and costly. The costs can be minimized by focusing on species that are used in traditional medicine. Michael Blalick (1990) found that using traditional knowledge increased the efficiency of screening plants for medical properties by more than 400 per cent.

91. Less developed countries, with relatively undisturbed ecosystems, are "gene-rich" compared with industrialized countries, but typically have not received any economic benefits from discoveries made within their territories. For example, the drugs vincristine and vinblastine have been used for 40 years in treating some forms of cancer. Both drugs were originally discovered in the "rosy periwinkle", Vinca rosea, a flowering plant which is native to Madagascar and has long been used by traditional healers in that country. Current sales of these drugs are worth about US$ 100 million, but neither Madagascar nor its traditional healers have received any share of this. Estimates of the total world sales of other products derived from traditional medicines run as high as US$ 43 billion. Among the major United States pharmaceutical companies now screening plant species are Merck & Co., Smithkline Beechcam, Monsanto, Sterling and Bristol Meyers.

92. The United States National Cancer Institute (NCI) began a global programme to collect and study naturally occurring substances in 1960. By 1981, it had tested 35,000 plant species and even larger numbers of micro-organisms. This effort has been intensified since 1986, with an added emphasis on discovering drugs to combat AIDS. Three United States institutions have been employed by NCI since 1986, at a cost of US$ 6.5 million, to collect plant species in 28 countries. Most of this work is performed through sub-contracts with 22 national organizations and institutions in the countries concerned, only one of which (in Zimbabwe) represents traditional healers. While NCI requires sub-contractors to obtain the consent of "native healers" who participate in this research, it does not specify that indigenous peoples be compensated for their medicinal knowledge or that they be included in any resulting patent.

93. In June 1992, the United States National Institutes of Health launched a new programme in cooperation with USAID to finance "drug discovery" projects in developing countries, making use of "the wealth of knowledge held by traditional cultures where medicinal potential can most likely be realized". Approximately US$ 1.5 million has been committed for three projects in 1994. Grants will be made to large institutions, which in turn may employ smaller organizations in developing countries to conduct the actual field research. Recipients of these grants are responsible for making arrangements to share any profits arising from their research "equitably" with all participating organizations in the countries concerned; however, there is no mention in the documentation for this new programme of the rights of the indigenous peoples whose knowledge will be sought and exploited.

94. At an August 1992 workshop convened by the National Institutes of Health to discuss this programme, NIH officials acknowledged the value of studying indigenous peoples' traditional knowledge. There was some doubt as to whether researchers needed to obtain the informed consent of indigenous peoples, and whether indigenous peoples providing useful medical and botanical information would be entitled to compensation as co-owners of any resulting patents. NIH officials maintained that the rights of indigenous peoples would depend entirely on the terms of any contracts made with them, or with the Government of the host country. In the past, however, bioprospectors have generally not made contracts with indigenous peoples, but rather with academic institutions in the host country, which have served as field researchers and collectors.

95. The number of pharmaceutical companies engaged in bio-prospecting is growing, but most contractual arrangements follow the same pattern. A transnational company that has the laboratory facilities necessary for testing the chemical properties of specimens, contracts with local universities and non-governmental organizations, which actually collect specimens in the field. Collectors generally receive a flat fee per specimen or per kilogramme of specimens. Their contracts may also entitle them to royalties from the sale of products which may be derived from their specimens. These royalties may be between 1 and 10 per cent of sales. Collectors do not ordinarily have any formal contractual arrangements, however, with the indigenous peoples upon whose knowledge of ecology they may rely.

96. Merck & Co., one of the world's largest pharmaceutical companies, with headquarters in the United States, made an agreement in 1991 with the Instituto Nacional de Biodiversidad (INbio) in Costa Rica, for the collection of plants and insect samples. Merck will have the exclusive right to study the potential commercial value of the species collected by INbio for two years, and the right to obtain patents for any useful chemical compounds which may be discovered, in exchange for providing INbio with laboratory facilities and paying royalties to INbio on the profits derived from any patents. The agreement does not specify how INbio will identify potentially valuable species or indicate whether indigenous peoples will be compensated for information they provide to INbio. However, INbio reportedly plans to educate rural people in the collection of samples, hoping to win support for conservation efforts. The actual extent of this local involvement remains unclear.

97. A somewhat different approach is taken by Shaman Pharmaceuticals, also based in the United States. Shaman has adopted what it calls an "ethnobotany-based discovery process", which focuses on understanding traditional medicine rather than attempting to screen large numbers of previously unstudied species. About half of the 400 species collected by this means have shown some medicinal potential, including two anti-viral drugs, which are currently undergoing clinical trials. Shaman's cost of discovering and developing these new drugs was only one tenth of the cost of laboratory synthesis and screening methods. Shaman has entered into cooperative agreements with indigenous organizations for plant collection, such as its December 1992 contract with the Consejo Aguaruna y Huambisa in Peru. It also organized a special foundation, The Healing Forest Conservancy, to support grassroots initiatives by indigenous peoples. According to Dr. Stephen R. King, Vice-President of Shaman Pharmaceuticals, "We are

committing ourselves to returning a portion of sales to all the peoples we work with", whether or not they provided the information that led to valuable products. "If we visit 55 villages in the course of two or three years we would be very happy to have one or two products come out of those visits."

98. Some research organizations in developing countries are trying to win more benefits for indigenous peoples. The Fundacao Brasiliera de Plantas Medicinals (FBPM) has convinced some pharmaceutical companies to purchase plant materials from indigenous communities in a processed form, such as extracts, which increases local employment, and to share profits equally with communities that provided useful information. In its arrangements with foreign companies, FBPM tries to obtain the right to distribute any medicines produced from Brazilian species, so that indigenous peoples and other Brazilians can share in the medical as well as economic benefits of research. It is not yet known whether major biotechnology companies such as Eli Lilly & Co., which last year invested US$ 4 million in Shaman Pharmaceuticals, will find such terms acceptable. It should also be noted that Western pharmaceutical firms are chiefly seeking treatments for problems of particular concern to Western populations, such as cardiovascular disease and cancer, while most people in developing countries have different priorities.

99. In principle, the industrial property laws of most countries only protect "new" knowledge. "Old" knowledge, such as the herbal remedies used by traditional healers for centuries, has generally been regarded as not patentable. However, biotechnology companies have been able to obtain patents for laboratory-synthesized replicas of molecules found in naturally-occurring and widely-used species of plants. For example, two companies recently obtained United States patents for synthetic derivatives of azadirechtim, the active substance in the seeds of Neem trees, used by rural people in India for centuries as a pesticide.

100. It is important to recognize that the knowledge has greater long-term value than the plant itself. Once studies of a plant have led to the identification and chemical analysis of the active molecule, it is only a matter of time before a process is developed to synthesize this molecule in the laboratory. For example, Mexican wild yams (Dioscorea spp.) were once the main source for the manufacture of steroids, but a sharp increase in the price of the Mexican product in the 1970s led to the development of several methods of synthesizing the active molecule diosgenin. Mexico accordingly lost this market.

101. In terms of compensation or benefits, two approaches have emerged thus far in industry practice. One approach is to pay individuals for information; the other, pioneered by Shaman Pharmaceuticals, relies on intermediary organizations to distribute economic benefits more widely among all participating communities. Thus far, the existing political leadership of indigenous peoples has largely been by-passed.

102. On the other hand, concern has been expressed about the social impact of paying large sums of money directly to indigenous community leaders. Royalty payments might increase traditional leaders' power and reduce their accountability to their own people. They might also provoke conflicts between

different clans and communities regarding the ownership of traditional knowledge, for example, if several tribes have traditionally used a medicinal plant, but only one of them sells its knowledge to a pharmaceutical company. Distributing funds through intermediary non-governmental organizations does not resolve these problems; the intermediaries cannot avoiding choosing which communities and individual leaders they will support. In either case, indigenous people themselves will need to develop new institutions for dealing effectively with outsiders and external financing. This, rather than the development of intermediary institutions, should be encouraged.

J. Indigenous science and technology

103. Although attention is currently focused upon the screening of naturally-occurring plant and insect species for their potential medical applications, there may eventually be an even larger market for genetic diversity in agricultural biotechnology. Unusual, useful traits of either naturally-occurring species or of cultivars (such as the hundreds of local varieties of rice, maize and potato found in indigenous and tribal communities) could be used to alter the genetic structures of commercial food and fibre crops, for example to increase their resistance to extreme temperatures, drought or disease. Plants which are cultivated today only by indigenous peoples may be modified genetically for commercial development. This is illustrated by recent scientific interest in the "peach palm", a tree fruit long cultivated by indigenous peoples in Amazonia. In yields per hectare, protein content and adaptability to tropical farming, peach palm is superior to maize (Blalick, 1984). With financing from USAID, agronomists have been collecting different genetic strains of peach palm with the goal of developing a variety with commercial potential. Indigenous peoples who first cultivated the species will receive no direct benefits.

104. Indigenous peoples' knowledge of ecology and ecosystem management may also have commercial value. For example, the commercial forestry project developed by the Yanesha Forestry Cooperative (COFYAL) in Peru in the 1980s applied traditional knowledge of forest ecology to boost or minimize the impact of logging on the long-term productivity of forest areas. COFYAL manager Manuel Lazaro (1993) has described the forestry scheme as one in which "Western technology provides the 'hardware' and indigenous knowledge the 'software'". Similarly, in the 1970s, Mikmaq fishermen in Nova Scotia, Canada, applied traditional knowledge of the marine ecosystem to solve the problem of growing oysters on soft muddy bottoms. Their method was quickly copied by non-indigenous businesses with superior access to financial markets, however. As a result, they realized little economic benefit from their discovery. Such insights into ecological processes do not fall within existing patent laws and are difficult to protect as "know-how".

105. In addition, there may be commercial possibilities in indigenous peoples' technologies, such as the metallurgy of the Kpelle people of Liberia, who reportedly have discovered corrosion-resistant alloys not known elsewhere.

106. It should be noted that United Nations agencies contribute to the financing and technical support for a number of projects involving the hybridization of commercial plant species with varieties developed by indigenous peoples. The United Nations Development Programme recently

approved a global project with the Centro Internacional de la Papa, at a cost of US$ 4.7 million, using biotechnology to transfer the insect-resistant characteristics of the potato varieties grown by indigenous peoples to commercially-grown potato varieties (DP/PROJECTS/REC/48). A similar effort, at the same cost level, is being pursued with regard to bananas (DP/PROJECTS/REC/49). Project documents do not indicate an awareness of the intellectual property rights of indigenous peoples.

K. Community control of research

107. In the United States, where indigenous peoples already exercise a large degree of local autonomy, a number of Indian tribes have enacted laws for regulating archaeological or cultural research. The Colville Confederated Tribes, in the state of Washington, established their own Archaeological and Historical Resources Board, which determines whether sites are culturally important, issues permits for research and makes recommendations for protection and restoration of sites. In addition, the Colville tribal authorities have adopted rules forbidding any kind of socio-cultural research in the community without prior application for a permit and agreement to respect the privacy of individuals. Similar rules have been adopted by many other American Indian tribes and have the force of laws under the United States legal system. The Navajo Nation, the largest indigenous people in the United States, with a territory extending over more than 25,000 square kilometres, has adopted laws to punish Navajos and physically remove non-Navajos who engage in unauthorized research or trade in cultural property.

108. Similarly, the Kuna people in Panama, who enjoy a degree of local autonomy under national laws, are requiring scientists visiting their 60,000 hectare Kuna Yala forest reserve to pay an entry fee, hire Kuna people as guides and assistants, train Kuna scientists, provide copies of research reports to the Kuna authorities and share the products of research, such as photographs and plant specimens. Kuna have published a 26-page handbook on scientific monitoring and cooperation, to serve as a guide for visiting scholars.

109. The establishment of community-based institutions for supervising research, promoting education and training, and conserving collections of important objects and documents, is clearly essential. However, in most countries, this process is only beginning. In the United States, national financial support for indigenous cultural and educational institutions became available in the 1970s. At present, 123 museums and cultural institutions are located in, and operated by, indigenous communities in the United States, offering a large pool of expertise for the launching of such programmes in other countries.

L. Professional organizations and ethics

110. There is a growing tension between Western scholars' interest in indigenous peoples' knowledge and protecting the right of indigenous peoples to control the dissemination and use of their knowledge. New academic periodicals have been established devoted entirely to studies of indigenous peoples' knowledge, such as the Journal of Ethnobiology, the Journal of

Ethnopharmacology, and the Indigenous Knowledge and Development Monitor. Information disclosed in this way can be used, commercially, before indigenous people have any opportunity to assert their rights. Similarly, the recently-established Fonds mondial pour le sauvegarde des cultures autochtones (FMCA), based in France, has as its goal the collection and dissemination of indigenous peoples' knowledge. While FMCA promises to restrict access to its archives, it may be asked why it would not be preferable to strengthen the capacity of communities to have their own research and documentation facilities. Accelerating the rate of Western research on indigenous knowledge is, at this point in time, more of a threat to indigenous peoples than a benefit for them.

111. In 1988, the International Society for Ethnobiology, at its first International Congress, held at Belem, Brazil, adopted a declaration of ethics in conducting research with indigenous peoples. The declaration calls upon scientists to return the products of their research in useful forms to the peoples they study, and for the payment of "just compensation" for the acquisition and commercial use of traditional knowledge. Annex I, section D contains the full text of the declaration.

112. The Society for Economic Botany, to which a large proportion of molecular prospectors belong, is currently considering the adoption of a code of professional ethics. The current draft, which is reproduced in Appendix E, would encourage researchers to respect the privacy of individual informants, to preserve the confidentiality of information when asked to do so, and to ensure that individuals who provide useful data are compensated.

113. Other relevant professional associations, such as the Society for Applied Anthropology, are also in the process of developing standards of conduct. Many anthropologists now argue that researchers can best repay indigenous communities by playing the role of "brokers" between these communities and corporations. They also advocate creating non-governmental organizations, like The Healing Conservancy, to repay communities indirectly through small grants and training programmes. Many indigenous organizations, particularly in Amazonia, have criticized these proposals as creating a kind of neo-colonialism, with Western academics and non-governmental organizations controlling the financial resources flowing to indigenous communities.

114. The Code of Ethics (1971) of the International Council of Museums (ICOM) encourages museum officials to consult the cultural authorities of the country of origin before acquiring any doubtful object. When a museum acquires a culturally important object without first contacting the country of origin, it should not be deemed an "innocent" purchaser in a subsequent dispute over ownership. ICOM applies this to objects "which are of major importance for the cultural identity and history of countries". There can of course be a wide difference of opinion as to whether particular objects are "important". In addition, it would be important to involve indigenous peoples directly in the work of the national ministries and agencies responsible for cultural matters in each country, so that they can give complete and accurate information when contacted by foreign museums.

M. Summary of major issues

115. In response to a request by Congress, the United States National Park Service recently conducted a study, in cooperation with American Indian associations, of measures needed to protect and develop Indian historical sites. The report of this study, Keepers of the Treasures, noted that while some Indian tribes were strongly opposed to research, others had begun to establish their own archaeological programmes and museums. "The key issue is control", the report concluded. Once they are assured of control of the disposition and interpretation of their cultural heritage, indigenous peoples are willing to collaborate with government agencies and academic institutions. The recommendations of this study are reproduced in full in Annex I, section F.

116. As the Whale House case study (Appendix A) amply demonstrates, an essential element of protection is respect for indigenous peoples' own laws and institutions which define what constitutes property and who has the right to dispose of property. Although the community's right to interpret and apply its own traditional laws was eventually upheld, it took six years of costly legal proceedings to settle this question in the federal courts. Nearly 10 years after the disputed objects were removed, their custody remains in question.

117. In February 1992, representatives of 29 indigenous peoples living in tropical forests met at Penang, Malaysia, where they agreed, inter alia, that

> "All investigations in our territories should be carried out with our consent and under joint control and guidance according to mutual agreement, including the provision for training, publication and support for indigenous institutions necessary to achieve such control."

The threshold issue is guaranteeing community control of research activities. Only if indigenous peoples can impose conditions on entry into their territories can they insist on negotiating for a share of any future benefits of research.

III. INTERNATIONAL LEGAL INSTRUMENTS AND MECHANISMS

A. Human rights instruments

118. Both article 27.2 of the Universal Declaration of Human Rights, and article 15.1 of the International Covenant of Economic, Social and Cultural Rights refer to the right of everyone to "the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". These provisions are aimed at the individual, rather than groups.

119. Article 5 (d) of the International Convention on the Elimination of All Forms of Racial Discrimination prohibits discrimination with respect to the ownership of property, individually or collectively. A government's failure to protect indigenous peoples' collective rights to their heritage may be discriminatory, if justified by the argument that indigenous peoples have a lesser right than the State, or museums and academic institutions.

120. In his recent report on the right to own property, the Special Rapporteur, Mr. Luis Valencia Rodriguez, concludes: "The sense of security and dignity gained from being able to own property is an essential prerequisite for the pursuit of happiness and exercise of a variety of other human rights" and is "related to all other human rights and fundamental freedoms" (E/CN.4/1993/15, para. 481). He also draws attention to the growing trend towards international and national recognition of the collective rights of indigenous peoples to land and other resources, as a factor contributing to their economic security and cultural development (paras. 378-396).

121. The UNESCO Declaration on the Principles of International Cultural Cooperation (1966) affirms that "Each culture has a dignity and value which must be respected and preserved" and furthermore, that "Every people has the right and duty to develop its culture". This suggests that peoples have collective rights to cultural integrity, including a right to define, interpret and determine the nature of future changes in their cultures.

122. United Nations human rights mechanisms, such as the Human Rights Committee, have not thus far been utilized to address questions of protecting the heritage of indigenous peoples.

B. UNESCO machinery for recovering cultural property

123. The lead agency within the United Nations system in the field of cultural property and heritage is UNESCO, and the principal instrument in this field is the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970). The Convention provides two main mechanisms for the protection of culturally important objects. A State party can request other State parties to impose emergency import controls on an object or class of objects. A State party can also request the return of illegally-exported objects under certain conditions, at the expense of the State making the request.

124. The UNESCO Convention has several shortcomings. Requests must be made by States, both States involved in a dispute must be parties to the Convention, and the removal of the object must have occurred after the Convention came into force in both States - necessarily after 1972. Most of the largest art-importing States, such as France, Germany, Japan and the United Kingdom are not parties, and indigenous peoples lost much of their cultural property before 1972.

125. The Organization of American States (OAS) Convention on the Protection of the Archaeological and Artistic Heritage of the American Nations (Convention of San Salvador, 1976), takes the same approach and has the same shortcomings.

126. In 1978, UNESCO also established the Intergovernmental Committee for Promoting the Return of Cultural Property to its Country of Origin with a mandate to undertake good offices and mediation at the request of States and to organize projects with, for example, the International Council of Museums and UNESCO national committees to conduct inventories of cultural property. Thus far, indigenous peoples have not been able to participate in the work of the Committee. The Committee has avoided disputes between States and their

constituent peoples, moreover. For example, it declined to take up Scotland's claim to the Stone of Scone, on the grounds that it was an internal affair of the United Kingdom.

127. Most Latin American States have nationalized their pre-Columbian artifacts in an effort to protect them. State ownership can conflict with the interests of indigenous peoples, however. When the Afo-A-Kom statue was returned to Cameroon in 1974, a dispute arose between state authorities and the Kom people over custody. It was eventually agreed to return it to its traditional site in Kom territory, rather than the national capital. The Government of Australia has returned Aboriginal materials repatriated from other countries to their Aboriginal owners, but in many other countries, repatriated objects are kept by the State itself and not returned to the peoples who produced them.

C. Copyright of literary and artistic works

128. The World Intellectual Property Organization (WIPO) administers a variety of conventions for the protection of intellectual property. Some conventions create international mechanisms for the registration and enforcement of property rights. Most conventions simply establish standards for accountability and reciprocity of State parties' national legislation, however. Thus indigenous peoples generally cannot obtain protection for their heritage directly through WIPO machinery, but may be able to use WIPO to promote the strengthening of national machinery in the countries concerned.

129. The Berne Convention for the Protection of Literary and Artistic Works, originally adopted in 1886, establishes international standards for harmonizing the copyright laws of States parties. Legal protection can be granted for many forms of creative expression, including music, dance, painting and sculpture, for the lifetime of the creator plus up to 50 years. Protection can also be granted to performers of literary and artistic works ("neighbouring rights"). Minimum standards for the protection of performers are further elaborated in the International Convention for the Protection of Performers, Producers of Phonogrammes and Broadcasting Organisations (Rome Convention), adopted in 1961.

130. An April 1993 issues paper prepared by the Australian Law Reform Commission succinctly explains the difficulties of using existing laws to protect indigenous peoples' cultural heritage. Traditional motifs are not the sole property of individual artists, to sell or withhold freely as they pleased, but are subject to layers of group rights, at the family, community and tribal levels. Many different individuals may need to be consulted about the disposition of a design, or objects that bear it. Copyright laws do not make such fine distinctions, but only recognize a single owner. Furthermore, copyright and other kinds of intellectual property protection are of limited duration, while Aboriginal people regard cultural rights as perpetual. Hence, applying the usual principles of copyright to Aboriginal heritage fundamentally alters the relationship between the artist and the community and does not provide adequate protection.

131. Article 2 (2) of the Berne Convention permits each State party to determine whether a work must be "fixed" in some physical form, such as a

written document or photography, before it can be given copyright protection. The requirement of fixation poses a problem for works of oral literature, poetry and song, which by their nature are repeated and frequently revised from generation to generation by word of mouth.

132. The Berne Convention was amended in 1971 to enable State Parties to designate "competent authorities" to control the licensing, use and protection of national "folklore". WIPO interprets this as including, in each State, "traditional manifestations of their culture which are the expression of their national identity" ("Protection of expressions of folklore", WIPO document GIC/UK/CNR/VI/12). However, indigenous peoples would certainly object to state management of their folklore as a part of national patrimony, with royalties being paid to the State instead of their own communities. Each State could, consistent with the Berne Convention, delegate responsibilities for the definition, protection and licensing of folklore to indigenous peoples themselves but, so far as the Special Rapporteur is aware, no State has yet done so; only a small number of States, among them Bolivia and Chile, have thus far adopted any laws on national folklore.

133. In 1982, WIPO drafted "Model provisions for national laws on the protection of expressions of folklore against illicit exploitation and other prejudicial actions", which include such tangible expressions of culture as pottery, costumes, jewellery and basketry. Fixation is not required. The Model law forbids any use with "gainful intent and outside its traditional or customary context without authorization by a competent authority or the community itself", as well as any kind of publication or use that either fails to identify the ethnic origins of folklore or distorts its contents. Some African States have adopted legislation based on the WIPO model.

D. Patent protection for scientific discoveries

134. The Paris Convention for the Protection of Industrial Property, which originally came into force in 1884, is aimed at maintaining some minimum uniformity in national laws relating to patents on technology, industrial designs, trademarks, trade names, appellations of origin and prevention of unfair competition.

135. There are three limitations on the usefulness of patents for the protection of indigenous peoples' heritage: (a) patents only apply to "new" knowledge; (b) rights are ordinarily granted to individuals or corporations, rather than to cultures or peoples; and (c) the rights granted are of limited duration. Patents are therefore not useful for protecting traditional or "old" knowledge, or knowledge which people wish to remain confidential.

136. "Novelty" is a basic requirement of patentability. A product or process is not ordinarily patentable if it is already known elsewhere in the world. It must also be described in such a way that it can be reproduced. Plants and animals would therefore only be patentable if they had been created by a process which can be described, controlled and reproduced, such as genetic engineering. Patenting of species and biological processes is not permitted at all under the European Patent Convention and some national legal systems, and in other countries is limited to organisms with a form, quality or

properties which are not already found in nature ("Protection of inventions in the field of biotechnology", WIPO document WIPO/IP/ND/87/2).

137. There is an exception to these rules in the case of the isolation and purification of naturally-occurring species of micro-organisms. The Budapest Treaty on the International Recognition of the Deposit of Micro-Organisms (1977) creates a network of international institutions for the deposit of micro-organisms and registration of rights to their commercial use. Indigenous peoples could conceivably use this Treaty to assert their rights to strains of yeasts and other micro-organisms long used for fermentation. They would need laboratory facilities to isolate and purify these organisms, however.

138. A special legal regime for the protection of "plant breeders' rights" was launched by the International Convention for the Protection of Plants (1961). To obtain protection, the applicant must deposit a sample of the plant variety for examination. It must be clearly distinguishable from any plant variety the existence of which is already a matter of common knowledge. It must also be stable and homogeneous, that is, "it must remain true to its description after repeated reproduction of propagation". There is a presumption of novelty if the variety has never previously been marketed or offered for sale, in which case its distinguishing characteristics may be of either natural or artificial origins. It would therefore be possible to obtain protection for traditional cultigens, such as varieties of maize and potatoes, as well as naturally occurring species used for medicine and not previously known by non-indigenous societies. The major obstacles to obtaining protection of plant breeders' rights are the costs of depositing a sample of the variety and demonstrating, through repeated propagation trials, that it is stable and homogeneous.

139. The Food and Agriculture Organization of the United Nations (FAO) recently established the International Fund for Plant Genetic Resources in accordance with an agreement recognizing "farmers' rights". Unlike "plant breeders' rights", these are not the rights of individuals, however, but the rights of States to benefit from the commercial development of traditional cultigens, such as bananas and rice. When a biotechnology company profits from using the genes discovered in traditionally-grown varieties of plants, it is supposed to repay some of this income to the Fund, in trust for the countries of origin of the genes. There is no mechanism to ensure that farmers or their communities receive any benefit from these payments, however. Farmers' rights are recognized in the 1992 Biodiversity Convention, as well.

140. Indigenous peoples' traditional knowledge of ecosystems includes more than the ability to identify useful species. It also includes a wide range of scientific insights and understanding of basic processes in ecology and animal behaviour. Scientific discoveries are generally excluded from patent protection, however. Although the Geneva Treaty on the International Recording of Scientific Discoveries (1978) offers a mechanism for recognizing the identity of the discoverer, article 1 of that Treaty defines scientific discovery as "the recognition of phenomena, properties or laws of the material universe not hitherto recognized and capable of verification".

141. Many applications of indigenous peoples' traditional knowledge to practical problems, such as harvesting fish, manufacturing pottery or managing forests, might still be patented as "technology". Technology can include any knowledge that is useful, systematic, organized with a view to solving a specific problem, and capable of being communicated in some way to others ("The elements of industrial property, WIPO document WIPO/IP/AR/85/7). The patentability of traditional technology depends on national legislation, however, and many countries may not consider long-held knowledge to be sufficiently novel and inventive to qualify for patent protection.

142. Although molecules discovered in naturally-occurring species cannot be patented as such, a chemical process used to isolate or purify the molecule, or to synthesize it, can be patented as technology. In addition, naturally-occurring molecules often provide what biochemists call "leads" or clues for the synthesis of related molecules that have the same valuable characteristics. Thus while indigenous peoples may guide the biochemist to a valuable molecule, only the work done by the biochemist is treated as proprietary.

143. It is discriminatory to treat the effort involved in isolating a chemical compound in the laboratory as more worthy of legal protection and compensation than the effort involved in centuries of observation and experimentation with naturally-occurring species. Furthermore, it is clear that using indigenous peoples' knowledge to select plants for laboratory analysis significantly reduces the cost of discovering new products. Thus, traditional knowledge has economic value, which should not be treated as a "free good".

144. These problems are not unique to indigenous peoples; many useful ideas in industry do not qualify for patent protection. They include "know-how" (experience in using a particular technique or device), and trade secrets (such as the formulas used to flavour certain processed foods and beverages). Companies generally protect their know-how and trade secrets by refusing to allow outsiders to visit their factories, or speak with their employees, unless they agree to a contract setting out conditions for the use of whatever they learn. Indigenous peoples could also withhold their knowledge except under licensing agreements providing for confidentiality, appropriate use and economic benefits. For the time being, this appears to be the most effective approach for protecting ecological, medicinal and spiritual knowledge.

E. Trademark and industrial design protection

145. Indigenous peoples' traditional artistic motifs might be brought within existing provisions for the protection of "industrial designs", defined in the Paris Convention as "the ornamental or aesthetic aspect of a useful article". To be eligible for protection, a design must be "original", however, and in most national legal systems, the duration of protection for industrial designs is less than for copyright - often as little as 15 years. This can be inadequate for designs of special cultural and spiritual significance, where protecting the integrity of the design may be of greater importance than exploiting its commercial value.

146. Characteristic motifs that serve to identify an indigenous people or community might also be protected as collective trademarks. Canada and other

States already use special "certification" marks to identify authentic works by indigenous peoples. Both are governed by article 7 bis of the Paris Convention. Not only designs, but sequences of words can be given trademark protection, so that, for example, clan and tribal names might be included. Unlike copyrights and industrial design protection, trademark protection is not limited in duration, but usually requires only registration and continued use. There could be problems under some countries' national laws, however, if a mark or design has already been widely copied by others.

147. Although indications of geographical origin cannot be registered as trademarks, they can be used to verify the authenticity of products as provided by the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (1966). This provides for the registration of the geographic name of an area "which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographic environment, including natural and human factors". This could be used to identify the characteristic products of indigenous communities, in combination with distinctive trademarks.

148. Article 10 bis of the Paris Convention forbids unfair competition in trade, which is defined as "acts of such a nature as to create confusion by any means whatsoever with the establishment, the goods, or the industrial or commercial activities of a competitor", as well as "indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity of the goods". This could be applied to a wide variety of disputes over the authenticity of products employing the designs or folklore of indigenous peoples. It only applies to products in trade, however, and not to preserving the privacy or integrity of things that indigenous peoples wish to keep for their own exclusive use.

F. Special instruments concerned with indigenous peoples

149. Article 4 of the International Labour Organisation Convention on Indigenous and Tribal Peoples, 1989 (No. 169), which entered into force in 1991, provides that "special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned" in accordance with their own "freely-expressed wishes". In addition, "the integrity of the values, practices and institutions of these peoples shall be respected", they "shall have the right to retain their own customs and institutions", and the right "to control, to the extent possible, their own economic, social and cultural development" (arts. 5, 7 and 8). States parties are directed to "respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with [their] lands or territories" (art. 13). While these provisions do not refer explicitly to cultural or intellectual property, they appear to be broad enough to require measures to protect all of the heritage, as defined here, of the peoples concerned, and to require respect for indigenous peoples' own laws and institutions respecting heritage.

150. Principle 22 of the Rio Declaration on Environment and Development affirms that:

> "indigenous peoples and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development" (Report of the United Nations Conference on Environment and Development, A/CONF.151/26/Rev.1, vol. I).

This emphasis on the "vital" importance of indigenous peoples' traditional knowledge of the ecosystems in which they live provides strong support for national and international measures to protect the heritage of these peoples.

151. The United Nations Conference on Environment and Development also adopted Agenda 21, a comprehensive plan of action. Chapter 26 of this plan is devoted entirely to the role of indigenous people, and calls upon States, inter alia, to:

> "adopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices" (A/CONF.151/26/Rev.1 (vol. I) para. 26.4 (b)).

Agenda 21 encourages Governments and international institutions to cooperate with indigenous peoples in "recognizing and fostering the traditional methods and knowledge" of these peoples, and applying this knowledge to managing resources (A/CONF.151/26/Rev.1 (vol. I) paras. 15.4 (g), 16.7 (b), 16.39 (a), 17.75 (b) and 17.82 (c)). These provisions, adopted by a consensus of all Member States, offer strong support for devising new international measures for the protection of indigenous peoples' heritage, in partnership with these peoples themselves.

G. International trade and aid measures

152. The Uruguay Round of the General Agreement on Tariffs and Trade (GATT) has been preoccupied with the issue of trade-related intellectual property rights (TRIPs). Industrialized countries have pressed for stringent universal respect for the patents issued to developers of biotechnology. Developing countries, farmers' organizations and grassroots non-governmental organizations have opposed this position, arguing that it will reinforce transnational corporations' ability to control the medicines and genetically-engineered plants they are devising with genetic resources collected in the South. Industrialized countries are likewise opposed to any preferences in favour of developing countries, with respect to the commercial exploitation of biodiversity. Although the 1992 Biodiversity Convention calls on all States Parties to contribute proportionally to the costs of conserving highly biodiverse ecosystems in the South, several States have made declarations interpreting this very narrowly. The interests of most indigenous peoples are aligned with developing countries and could be

seriously undermined by a GATT rule that favours the rights of biotechnology companies over those of the States and peoples who manage biodiverse ecosystems.

153. Since 1990 there have been several unsuccessful attempts in the United States to enact new laws that would require respect for the intellectual property of indigenous peoples. Senate Bill 748, if adopted, would have given priority, in United States foreign assistance, to the protection of indigenous peoples, including their "proprietorship of the traditional knowledge of plant and plant resources". House Concurrent Resolution 354 would have directed United States diplomats to take account of traditional knowledge in the current round of GATT negotiations. House Bill 1596 would have required that United States foreign policy and foreign aid be consistent with the rights of indigenous peoples. There may be further efforts to tie United States aid and trade policy to respect for indigenous peoples' lands and heritage. A 1989 resolution adopted by the European Parliament called upon the European Commission and Council to insert such conditions in overseas aid agreements (reproduced in E/CN.4/Sub.2/AC.4/1989/3, pp. 7-11). It would be preferable to agree upon universal standards, rather than leave the question of respect for the rights of indigenous peoples to unilateral economic policies and bilateral negotiations.

H. Private international law

154. Domestic courts will usually return a stolen object to its owners across international frontiers, applying the laws concerning the situs of the alleged theft. Disputes often arise over the interpretation of local laws, however. In the case of the Parthenon Marbles, for example, the British Museum argued that their removal had been properly authorized by Turkey, during the time it occupied Greece. The same argument was made in a recent litigation over the removal of Byzantine mosaics from a church in the Turkish-occupied part of Cyprus. A United States court concluded that the occupation had not suspended Cypriot law, which recognized the mosaics as the property of the Greek Orthodox Church (Autocephalous Greek Orthodox Church of Cyprus v. Goldberg, 1990).

155. Proof of ownership under traditional or customary laws can be the decisive factor in such cases. A British court rejected an attempt by New Zealand to retrieve some important Maori door panels from London, because the claim was based on New Zealand export-control laws rather than prior ownership by a specific Maori tribe (Attorney-General of New Zealand v. Ortiz, 1982). By contrast, India successfully brought a legal action in the United Kingdom to recover sacred statues of Siva taken illegally from the ruins of Hindi temples. The temples and the god Siva were treated as co-plaintiffs, in accordance with Hindu laws, which was tantamount to recognizing the status as property of Hindus as a people (Greenfield, 1989).

156. Wider publication of indigenous peoples' traditional laws would deprive purchasers of the defence of having no knowledge that objects were improperly acquired. In the case of objects that are well known, or well documented, courts will apply the principle of caveat emptor. If the status of objects under local or customary laws is uncertain, however, courts are reluctant to treat the purchaser as a thief.

157. The International Institute for the Unification of Private Law (UNIDROIT) has prepared a draft convention on stolen or illegally exported cultural objects (UNIDROIT study LXX, document 19 (1990)). The UNIDROIT draft opens the courts of each contracting State to claims by the others and requires "compensation" to be paid by the States making claims to innocent purchasers of stolen cultural property. It permits (but does not require) the retroactive application of its provisions. It also prescribes a number of factors to be considered by courts when determining whether to return a particular object. These include the "outstanding cultural importance" of the object to the claiming State, as well as its "use by a living culture" within that State. This last provision is of particular relevance to indigenous peoples.

158. In some countries, indigenous peoples are not recognized as legal entities capable of owning property collectively or of bringing legal actions in national courts, however. They may also lack the financial means of pursuing legal actions in other States, forcing them to rely on support from their national Governments.

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Basis for action

159. Indigenous peoples have been particularly vulnerable to the loss of their heritage as distinct peoples. Usually viewed as "backward" by Governments, they have been the targets of aggressive policies of cultural assimilation. Their arts and knowledge were frequently not regarded as world treasures and were simply destroyed in the course of colonization. Their bodies were often valued more highly than their cultures, and were collected by museums. Tourism, a growing consumer demand for "primitive" art and the development of biotechnology now threaten indigenous peoples' ability to protect what remains of their heritage.

160. The United Nations Technical Conference on Practical Experience in the Realization of Sustainable and Environmentally Sound Self-Development of Indigenous Peoples, held at Santiago, Chile, from 18 to 22 May 1992, recommended that:

> "the United Nations system, with the consent of indigenous peoples, take measures for the effective protection of property rights (including the intellectual property rights) of indigenous peoples. These include, inter alia, cultural property, genetic resources, biotechnology and biodiversity" (E/CN.4/Sub.2/1992/31, Section V, Recommendation 10).

The experts who attended this Conference also stressed the importance of strengthening indigenous peoples' own institutions, and of exchanges of information among such institutions worldwide. These recommendations were reinforced by the instruments adopted by the 1992 United Nations Conference on Environment and Development.

161. The Sub-Commission on Prevention of Discrimination and Protection of Minorities emphasized, in its resolution 1991/32 of 29 August 1991, that international trafficking in indigenous peoples' cultural property "undermines

the ability of indigenous peoples to pursue their own political, economic, social, religious and cultural development in conditions of freedom and dignity". This applies with equal urgency to all aspects of indigenous peoples' heritage.

162. Further erosion of indigenous peoples' heritage will not only be destructive of their self-determination and development, but undermine the future development of the countries in which they live. For many developing countries, indigenous peoples' knowledge may hold the key to achieving sustainable national development, without greater dependence on imported capital, materials and technologies.

163. Protecting the heritage of indigenous peoples will require urgent and effective international action because of the growth of biotechnology industries, the continuing destruction of indigenous peoples' lands in many parts of the world and the popularity of indigenous peoples' art and culture for tourism and export.

B. Basic principles

164. "Heritage" includes all expressions of the relationship between the people, their land and the other living beings and spirits which share the land, and is the basis for maintaining social, economic and diplomatic relationships - through sharing - with other peoples. All of the aspects of heritage are interrelated and cannot be separated from the traditional territory of the people concerned. What tangible and intangible items constitute the heritage of a particular indigenous people must be decided by the people themselves.

165. It is difficult to recapture objects, designs or knowledge once they have been acquired by non-indigenous people, therefore the most critical and effective means for the protection of indigenous peoples' heritage is the ability of indigenous communities to control access to their territories. Achieving this will require demarcation of lands, as well as support for capacity-building in indigenous communities.

166. The implementation of all development projects should be preceded by assessment of the potential impact on the heritage of indigenous peoples, conducted in partnership with the peoples concerned. It is difficult, and in many cases inappropriate, to attempt to identify specific "sacred sites" or sites of special cultural importance to indigenous peoples. All lands and resources are, to a greater or lesser extent, sacred and integral to indigenous peoples' cultures and spiritual life, and often the most important places cannot be revealed to outsiders. It must be presumed that everything within the traditional territory of a specific people has a traditional cultural and spiritual value and importance to them.

167. It would also prove difficult and inappropriate to try to compile a catalogue of all the categories of cultural and intellectual property recognized by indigenous peoples, with their laws for the transmission of rights of use. Apart from the overwhelming complexity of the task and the confidentiality of much of the information required, there is a danger that such a catalogue would encourage outsiders to think that the heritage of

indigenous peoples can be sold. While greater public awareness of the broad outlines of indigenous peoples' own laws would be desirable, the precise determination and application of these laws must be left to each indigenous people itself. Above all, it must be acknowledged that indigenous peoples wish to retain their heritage as a whole intact.

168. With respect to the commercial development of indigenous peoples' distinctive arts, designs and folklore, the institutional capacity of indigenous peoples and communities to take advantage of existing laws, such as trademark and copyright laws, needs to be strengthened. It would be enhanced by recognition, in national legislation and international instruments, of their right to define and control their own heritage.

169. With respect to potential commercial applications of indigenous peoples' medical and ecological knowledge, existing legal schemes are inadequate. Consequently, it is essential to focus on increasing the capacity of indigenous peoples to supervise research conducted in their territories, and to develop their own institutions for medical and ecological research.

170. In most parts of the world, indigenous peoples have already been subjected to extreme hardships and interference with their social and cultural life. This has undermined the ability of indigenous peoples to transmit their knowledge and arts from generation to generation, by disrupting families and traditional systems of education and training. The future integrity of indigenous peoples' heritage therefore depends fundamentally and inescapably on recognition and strengthening of the right of each indigenous people to control, and develop, its own forms of education.

C. Recognition of ownership

171. Indigenous peoples are the true collective owners of their works, arts and ideas, and no alienation of these elements of their heritage should be recognized by national or international law, unless made in conformity with indigenous peoples' own traditional laws and customs and with the approval of their own local institutions. This principle should be adopted by the General Assembly, by relevant specialized agencies such as WIPO and UNESCO, and by regional intergovernmental organizations.

172. In its resolution 46/10 of 22 October 1991, the General Assembly reaffirmed the importance of inventories as an essential tool in the identification and recovery of cultural property. Indigenous peoples lack the resources necessary to compile inventories of their dispersed heritage or to arrange for the return of objects across international frontiers. Governments, international institutions and relevant non-governmental organizations should give urgent attention and priority to these needs.

173. There is a need to educate the public, as well as scientific and academic associations, to respect the rights of indigenous peoples to privacy, cultural integrity and control of their own heritage through their own laws and institutions. Bodies and agencies such as UNDP, UNESCO and WIPO should co-sponsor seminars with indigenous peoples and the organizations that represent, inter alia, anthropologists, museums and medical researchers.

174. Indigenous peoples' traditional laws and procedures for custody, protection and disposition of cultural and intellectual property need greater publicity and understanding. This will help prevent disputes and protect indigenous peoples from unjust claims based upon ignorance or with their consent. UNESCO could consider this as a long-term task involving collaboration with indigenous scholars and institutions.

175. The Centre for Human Rights, ILO and UNESCO should collaborate with indigenous peoples and individual indigenous experts in elaborating principles and guidelines, as well as in drafting and publishing model national legislation, for the protection of all aspects of indigenous peoples' heritage.

D. Recovery of lost or dispersed heritage

176. With respect to sacred objects, valuable plants and other aspects of indigenous peoples' heritage that have already been appropriated by others, existing national and international laws and legal mechanisms do not provide adequate remedies. The United Nations, UNESCO and other relevant agencies, in partnership with indigenous peoples, should:

(a) Establish programmes to provide indigenous peoples with financial and technical assistance to compile inventories of the collections of museums and scientific institutions, worldwide;

(b) Establish a mediation mechanism, similar to the existing machinery of UNESCO for the return of cultural property between States, that can respond to applications made by indigenous peoples and facilitate the return of their cultural property across international borders; and

(c) Establish a trust fund for indigenous peoples' heritage, with the mandate to act as a global agent for the protection and licensing of rights to the use of indigenous peoples' heritage, when requested by the peoples concerned or in cases where the peoples concerned cannot immediately be identified.

E. Prevention of further losses of heritage

177. With respect to cultural and intellectual property which is still in the possession of indigenous peoples, the most effective protection is indigenous peoples' control of research, tourism and development in their territories. Indigenous peoples must be able to make entry into their territories and communities conditional upon visitors' formal agreement to declare the purpose of their visit, accept supervision by community officials, respect the privacy of individuals and share the findings as well as the economic benefits of research. Indigenous peoples must also have the ability to manage trade conducted in their territories, at least to the extent of licensing merchants and inspecting shipments entering or leaving their communities.

178. The United Nations system should play a central role in building the capacity of indigenous peoples to manage research, tourism, trade and development in their territories, through technical assistance and through financial mechanisms such as the Global Environment Facility. This

international assistance for capacity building should include the development of new scientific and educational institutions, controlled by indigenous peoples themselves, which can take the place of foreign intermediaries, as well as:

(a) Teaching in the effective application of existing relevant international rules and the use of mechanisms or procedures, in particular, with respect to patents and copyright, the securing of plant breeders' rights and the registration of collective trademarks and certification marks;

(b) Research and documentation of folklore, plant varieties and other elements of heritage which are protectable under existing laws, including support for preparing the required applications;

(c) Development of community infrastructure for the protection of all aspects of heritage, including monitoring and information offices, and organizations of indigenous artists and performers.

179. WIPO should convene a group of experts to prepare recommendations for possible future revisions of the Paris and Berne Conventions, with respect to:

(a) Recognizing indigenous communities as competent authorities for the ownership and licensing of arts, folklore and other forms of cultural and intellectual property;

(b) Extending the maximum period of protection for culturally and religiously significant works and expressions; and

(c) Flexibly interpreting the conditions for patentability, so as to include traditional knowledge of medicine, ecosystems and know-how.

180. It will be of fundamental importance that the agreements reached by the current Uruguay Round of the GATT negotiations not forbid national Governments from enacting laws to afford longer-term or more stringent protection of indigenous peoples' heritage than would otherwise apply to cultural, artistic, intellectual or industrial property.

F. Future role of the study

181. This study could be continued by providing the Special Rapporteur with a mandate to draft basic principles and guidelines related to the protection of "indigenous heritage" and to promote a wider dialogue between the indigenous peoples and the United Nations, UNESCO, WIPO, international financial institutions, and scientific and professional associations in this field.

ANNEX I

Case studies and documents

A. Looting of the Chilkat Whale House

1. The Tlingit people of south-eastern Alaska have traditionally been organized into several Clans. Each Clan, in turn, is subdivided into a number of house groups, so named because each house group originally lived together in a single large wooden structure, and worked together as a single economic unit. Now that Tlingit people have adopted some aspects of Western technology, families live in smaller, Western-style buildings. The larger, traditional buildings are still maintained by clans, however, as ceremonial centres. They are decorated with carved posts and panels depicting the ancestry and history of the clan. Each building has a traditional caretaker or trustee (hitsati in Tlingit). The caretaker keeps the keys to the building and is often responsible for remembering and teaching the history of the house group.

2. One of the most famous of these buildings is the Whale House of the Ganaxteidi (Raven) clan, in the village of Chilkat, first built in the 1830s. Chilkat Village has its own tribal council, organized in accordance with national laws respecting Indian autonomy, and in 1976, after the looting of the nearby frog house, the council enacted laws forbidding the removal of cultural property from the community without the council's approval.

3. In 1984, an art dealer persuaded several Tlingit individuals, who lived at Chilkat, to remove four carved posts and a large carved panel from the Whale House. The objects were then shipped to Seattle to be sold, but the village obtained a federal court order temporarily halting the sale of these objects on the grounds that their removal may have been unlawful. The federal court subsequently decided that the question of ownership of the posts and panel must be decided by the village itself through its own court. The village court accordingly held hearings on the issue of ownership, listening to testimony from elders and anthropologists familiar with traditional Tlingit law, and it is expected to make a decision later this year.

4. The village court must resolve a dispute over the interpretation of Tlingit law. The individuals who removed the posts and panel argue that they had permission to do so from the hitsati of the Whale House. Village leaders argue that the hitsati is merely a caretaker and does not have authority to dispose of property. They also argue that house furnishings belong to the clan as a whole, not merely the house group, so that the entire clan must approve of any actions affecting a house or its contents.

B. Repatriating Hawaiian human remains

5. Contemporary leaders of the indigenous people of Hawaii say that their communities "are spiritually trapped because their ancestors are not at rest" (Ayau, "Restoring the ancestral foundation", pp. 195-196). Comparing the collection and exportation of human remains to slavery, they have recently launched a global campaign for return and reburial of Hawaiian skeletons and grave goods.

6. The indigenous organization, "Hui Malama i na Kupuna o Hawai'i 'i Nei" (Group Caring for the Ancestors of Hawaii) was organized in 1989 to protest the destruction of some 1,100 graves on the island of Maui, during construction of the Ritz-Carlton Hotel. All of the bodies were eventually reburied by order of the Governor of Hawaii and the state of Hawaii purchased rights to the burial site in order to protect it. This success led Hui Malama to mount a global effort to recover human remains from museums worldwide, for reburial in Hawaii. In the past three years, Hui Malama has negotiated the return of Hawaiian remains from 18 museums in the United States, as well as museums in Australia, Canada and Switzerland.

7. Hui Malama has been assisted in these efforts by new United States laws. The Native American Graves Protection and Repatriation Act (NAGPRA), which Congress amended in 1991 to include protection of the indigenous people of Hawaii, applies to museums that receive financial assistance from the United States Government. Government-funded institutions are required to prepare inventories of their holdings of human remains to determine the "cultural affiliation" of each skeleton. Once the affiliation of human remains with a particular indigenous people has been established, the institution must "expeditiously return" them, if requested by the indigenous people concerned. Disputes often arise, however, over the identity of particular sets of remains.

8. For example, the Bishop Museum in Honolulu gave 24 sets of human remains to the American Museum of Natural History in New York in 1921. The bones were simply identified as "Hawaiian", but Hui Malama noted that they had originally been obtained from an archaeologist who had been well known for his excavations of the Mo'omomi sand dunes on the island of Molokai. Working with the indigenous community on Molokai, Hui Malama persuaded museum officials to negotiate the return of these remains so that they could be reburied in accordance with traditional Hawaiian burial practices on their island of origin.

9. Hui Malama has been less successful overseas. In the case of 149 Hawaiian skulls in the collection of the British Museum in London, the museum argued that returning such human remains was barred by British law. The United States Department of State refused to become involved, noting that the United States has no applicable cultural-property agreements with the United Kingdom. Similarly, when Hui Malama requested return of three Hawaiian skulls from the Staatliches Museum für Volkerkunde in Dresden, museum officials stated that the skulls were the property of the German State, and therefore could not be relinquished. Again the United States Government indicated that it could not take any action in the absence of a relevant agreement with Germany.

C. Hydropower versus the sacred: Snoqualmie Falls

10. Snoqualmie Falls is a spectacular 85-metre-high waterfall on the Snoqualmie River in the state of Washington, a short distance east of Seattle. At the bottom of the Falls is a semi-circular basin, used as a place to gather medicinal plants and acquire spiritual powers by the Snoqualmie people. The Falls also served as a key point of control in traditional trade between

peoples of the mountains and the sea, which the Snoqualmie long controlled. Other indigenous peoples regarded the Falls as sacred and conducted ceremonies there under the stewardship of the Snoqualmie.

11. In 1855, the Snoqualmie and neighbouring tribes signed a treaty, by which they gave up most of their territory in exchange for a number of small "Indian reservations", development aid and legal protection of their hunting and fishing rights. Unhappy with the lands set aside for them, which were on the sea coast far from their mountain homeland, many Snoqualmie refused to leave the area around the Falls, and stayed in a small community there. The United States Government refused to recognize this community as an "Indian tribe", however, and therefore failed to protect its claims to hunting, fishing or cultural rights.

12. Fifty years after the treaty, Puget Sound Power and Light Co. was given a concession to develop the Falls for hydropower and the forests around the Falls were opened to logging companies. The power company dynamited tunnels and channels through the rock face of the Falls and built a powerhouse at the top. It later built a park and observation platform overlooking the Falls, which have become one of this region's most important tourist attractions. Snoqualmie people have continued to use the pool at the base of the Falls for religious purposes, with diminished privacy, and have repeatedly protested modifications of the natural landscape.

13. Recently, Puget Sound Power announced plans to enlarge its power-production facilities and divert more water from the Falls. Plans for developing town sites around the Falls also alarmed the Snoqualmie. In 1990, tribal leaders formed an alliance with local Christian churches. First, they convinced Washington state officials to make an application to place the Falls on the National Register of Historic Places. Puget Sound Power protested this, and has thus far been able to block the approval of the application.

14. In 1992, the Snoqualmie and their supporters filed a legal action to oppose the relicensing of the power plant. Under federal law, all power-generating facilities must periodically be reviewed to determine whether they are still being operated in the public interest. Adverse impacts on certain cultural and environmental resources are considered as part of these periodic reviews. The Snoqualmie argued that the cultural significance of the Falls outweighed their use for power. The company argued that since the Snoqualmie were not recognized by the Federal Government as an "Indian tribe", they could not assert Indian cultural or religious rights under federal legislation.

15. As this report was being written, the Bureau of Indian Affairs of the United States Government published a "proposed" decision that the Snoqualmie are in fact an Indian tribe, which could change the outcome of the dispute over the Falls significantly.

D. The Declaration of Belem

16. In July 1988, the First International Congress of Ethnobiology produced a position statement signed by the International Society of Ethnobiology, which was founded during the Congress. The "Declaration of Belem" essentially

affirms recommendations made by the International Labour Organisation. It further attempts to translate Indian rights into terms of responsibility for scientists and the world's economic and political leaders. Here is the Declaration in full:

"As ethnobiologists, we are alarmed that

SINCE

- tropical forests and other fragile ecosystems are disappearing,

- many species, both plant and animal, are threatened with extinction,

- indigenous cultures around the world are being disrupted and destroyed:

and GIVEN

- that economic, agricultural, and health conditions of people are dependent on these resources,

- that native peoples have been stewards of 99% of the world's genetic resources, and

- that there is an inextricable link between cultural and biological diversity;

We, members of the International Society of Ethnobiology, strongly urge action as follows:

HENCEFORTH:

1. A substantial proportion of development aid be devoted to efforts aimed at ethnobiological inventory, conservation, and management programmes;

2. Mechanisms be established by which indigenous specialists are recognized as proper authorities and are consulted in all programmes affecting them, their resources, and their environments;

3. All other inalienable human rights be recognized and guaranteed, including cultural and linguistic identity;

4. Procedures be developed to compensate native peoples for the utilization of their knowledge and their biological resources;

5. Educational programmes be implemented to alert the global community to the value of ethnobiological knowledge for human well-being;

6. All medical programmes include the recognition of the respect for traditional healers and incorporation of traditional health practices that enhance the health status of these populations;

7. Ethnobiologists make available the results of their research to the native peoples with whom they have worked, especially including dissemination in the native language;

8. Exchange of information be promoted among indigenous and peasant peoples regarding conservation, management, and sustained utilization of resources".

(22 July 1988)

E. Society for Economic Botany: Draft guidelines

"PROFESSIONAL ETHICS IN ECONOMIC BOTANY: A PRELIMINARY DRAFT OF GUIDELINES

PREAMBLE

"In conducting their research, economic botanists often must confront difficult ethical issues related both to their data collection needs and methods, and to the dissemination and use of their findings. Since economic botanists are a diverse group with greatly varying scientific backgrounds and professional affiliations, their ethical problems are both diverse and complex. This document presents guidelines for professional behaviour for members of the SOCIETY FOR ECONOMIC BOTANY.

"1. MEMBERS OF THE SOCIETY FOR ECONOMIC BOTANY HAVE RESPONSIBILITIES TO THE PUBLIC.

A. They will strive to use their knowledge, skills, and training to enhance the well-being of humankind. They will specifically refuse to work professionally on any research that will result in harm being done to anyone.

B. They will strive to maintain professional competence and will not offer advice on subjects on which they are uninformed.

C. They will not engage in nor allow the dissemination of information about economic botany that is false, misleading, or exaggerated.

"2. MEMBERS OF THE SOCIETY FOR ECONOMIC BOTANY HAVE RESPONSIBILITIES TO THOSE STUDIED.

A. They will communicate clearly and honestly to all informants the objectives and possible consequences of one's research. If the research has a commercial objective, they will make that explicit and will disclose what the commercial results might reasonably be expected to be.

B. They will comply with all rules and limitations that informants or their institutions place on the research. They will not "trick" informants into revealing "secret" information. They will supply any reports or results that are requested.

C. They will respect any request for confidence made by those providing data or materials, provided that the maintenance of such confidence does not compromise other ethical considerations.

D. They will respect informants' right to anonymity and privacy when it is requested.

E. When materials or information obtained from informants can reasonably be expected to have a commercial pay off, they will arrange with employers for equitable economic compensation for the informant(s) and will do all in their power to ensure that compensation is paid.

"3. MEMBERS OF THE SOCIETY FOR ECONOMIC BOTANY HAVE RESPONSIBILITIES TO HOST GOVERNMENTS AND OTHER HOST INSTITUTIONS.

A. They will comply honestly and completely with all regulations requesting disclosure of project objectives, sponsorship and methods, as well as with obligations to supply reports and specimens and to perform specified services (e.g., seminars and training).

B. They will, when the situation requires, make clear that they will not compromise their professional ethics as a condition of their receiving clearance to do research. Specifically, they will provide no secret information or reports that might jeopardize informants or others.

C. They will assist their foreign collaborators in enhancing the physical and human resources of their institutions.

"4. MEMBERS OF THE SOCIETY FOR ECONOMIC BOTANY HAVE RESPONSIBILITIES TO THE PROFESSION.

A. They will maintain a level of integrity and professional behaviour in the field so as not to jeopardize future research by others.

B. They will not present as their own the work of others.

C. They will not allow, to the limits of their abilities, their materials to be used for fraudulent or harmful purposes.

"5. MEMBERS OF THE SOCIETY FOR ECONOMIC BOTANY HAVE RESPONSIBILITIES TO SPONSORS.

A. They will honestly disclose their qualifications and capabilities for particular work, as well as relevant limitations.

B. They will fully disclose to sponsors that they will comply with the ethical guidelines of the SOCIETY FOR ECONOMIC BOTANY, including the stipulation that those studied will be fully informed concerning the objectives, including commercial ones, and possible results of research."

F. Recommendations of the Keepers of the Treasures

"KEEPERS OF THE TREASURES

"Protecting Historic Properties and Cultural Traditions on Indian Lands

"A Report on Tribal Preservation Funding Needs Submitted to Congress by the National Park Service, United States Department of the Interior

"May 1990

"Recommendations

"1. The American people and their government should affirm as a national policy that the historical and cultural foundations of American Indian tribal cultures should be preserved and maintained as a vital part of our community life and development.

"2. The national American Indian cultural heritage policy should recognize that programmes to preserve the cultural heritage of Indian tribes differ in character from other American preservation programmes.

"3. Federal policy should encourage agencies that provide grants for museum, historic preservation, arts, humanities, education, and research projects to give reasonable priority to proposals for projects carried out by or in cooperation with Indian tribes.

"4. Federal policy should require Federal agencies, and encourage State and local governments, to ensure that Indian tribes are involved to the maximum extent feasible in decisions that affect properties of cultural importance to them.

"5. Federal policy should encourage State and local governments to enact laws and ordinances providing for the identification and protection of properties of significance to Indian tribes in order to protect such properties from the effects of land use and development and from looting and vandalism.

"6. Federal policy should encourage the accurate representation of the cultural values, languages, and histories of Indian tribes in the public schools and in other educational and interpretative programmes.

"7. Federal policy should recognize the central importance of language in maintaining the integrity of Indian tribal traditions and the tribal sense of identity and well-being. National efforts to assist tribes to preserve and use their native languages and oral traditions should be established in conjunction with the amendment of the National Historic Preservation Act recommended below.

"8. As part of developing a consistent American Indian cultural heritage policy, a national approach should be developed regarding the exhumation, retention, display, study, repatriation, and appropriate cultural treatment of human remains, funerary artefacts, and sacred artefacts.

"9. Tribal needs for confidentiality of certain kinds of information should be respected.

"10. Federal policy should provide for the appropriate involvement of Indian tribes in Federally-assisted preservation research on tribal lands and on ancestral lands off reservations.

"11. Toward the achievement of tribal participation in preservation activities, it may be desirable to consider chartering the establishment of a national private organization to promote and assist in the preservation of the cultural heritage of Indian tribes.

"12. National programmes for training of tribal members in preservation-related disciplines should be developed.

"13. The National Historic Preservation Act, as amended (16 U.S.C. 470) should be amended to establish a separate title authorizing programmes, policies and procedures for tribal heritage preservation and for financial support as part of the annual appropriations process."

ANNEX II

Principle 67 of the UNESCO Declaration on the Principles of International Cultural Cooperation

"O. Right to enjoy culture; international cultural development and cooperation

"67. Declaration of the Principles of International Cultural Cooperation

"Proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its fourteenth session, on 4 November 1966

"The General Conference of the United Nations Educational, Scientific and Cultural Organization, met in Paris for its fourteenth session, this fourth day of November 1966, being the twentieth anniversary of the foundation of the Organization,

"Recalling that the Constitution of the Organization declares that "since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed" and that the peace must be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind,

"Recalling that the Constitution also states that the wide diffusion of culture and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern,

"Considering that the Organization's Member States, believing in the pursuit of truth and the free exchange of ideas and knowledge, have agreed and determined to develop and to increase the means of communication between their peoples,

"Considering that, despite the technical advances which facilitate the development and dissemination of knowledge and ideas, ignorance of the way of life and customs of peoples still presents an obstacle to friendship among the nations, to peaceful cooperation and to the progress of mankind,

"Taking account of the Universal Declaration of Human Rights, the Declaration of the Rights of the Child, the Declaration on the Granting of Independence to Colonial Countries and Peoples, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, the Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples, and the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, proclaimed successively by the General Assembly of the United Nations,

"Convinced by the experience of the Organization's first 20 years that, if international cultural cooperation is to be strengthened, its principles require to be affirmed,

"Proclaims this Declaration of the principles of international cultural cooperation, to the end that governments, authorities, organizations, associations and institutions responsible for cultural activities may constantly be guided by these principles; and for the purpose, as set out in the Constitution of the Organization, of advancing, through the educational, scientific and cultural relations of the peoples of the world, the objectives of peace and welfare that are defined in the Charter of the United Nations:

"Article I

1. Each culture has a dignity and value which must be respected and preserved.

2. Every people has the right and the duty to develop its culture.

3. In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind.

"Article II

Nations shall endeavour to develop the various branches of culture side by side and, as far as possible, simultaneously, so as to establish a harmonious balance between technical progress and the intellectual and moral advancement of mankind.

"Article III

International cultural cooperation shall cover all aspects of intellectual and creative activities relating to education, science and culture.

"Article IV

The aims of international cultural cooperation in its various forms, bilateral or multilateral, regional or universal, shall be:

1. To spread knowledge, to stimulate talent and to enrich cultures;

2. To develop peaceful relations and friendship among the peoples and bring about a better understanding of each other's way of life;

3. To contribute to the application of the principles set out in the United Nations Declarations that are recalled in the Preamble to this Declaration;

4. To enable everyone to have access to knowledge, to enjoy the arts and literature of all peoples, to share in advances made in science in all parts of the world and in the resulting benefits, and to contribute to the enrichment of cultural life;

5. To raise the level of the spiritual and material life of man in all parts of the world.

"Article V

Cultural cooperation is a right and a duty for all peoples and all nations which should share with one another their knowledge and skills.

"Article VI

International cooperation, while promoting the enrichment of all cultures through its beneficent action, shall respect the distinctive character of each.

"Article VII

1. Broad dissemination of ideas and knowledge, based on the freest exchange and discussion, is essential to creative activity, the pursuit of truth and the development of the personality.

2. In cultural cooperation, stress shall be laid on ideas and values conducive to the creation of a climate of friendship and peace. Any mark of hostility in attitudes and in expression of opinion shall be avoided. Every effort shall be made, in presenting and disseminating information, to ensure its authenticity.

"Article VIII

Cultural cooperation shall be carried on for the mutual benefit of all the nations practising it. Exchanges to which it gives rise shall be arranged in a spirit of broad reciprocity.

"Article IX

Cultural cooperation shall contribute to the establishment of stable, long-term relations between peoples, which should be subjected as little as possible to the strains which may arise in international life.

"Article X

Cultural cooperation shall be specially concerned with the moral and intellectual education of young people in a spirit of friendship, international understanding and peace and shall foster awareness among States of the need to stimulate talent and promote the training of the rising generations in the most varied sectors.

"Article XI

1. In their cultural relations, States shall bear in mind the principles of the United Nations. In seeking to achieve international cooperation, they shall respect the sovereign equality of States and shall refrain from intervention in matters which are essentially within the domestic jurisdiction of any State.

2. The principles of this Declaration shall be applied with due regard for human rights and fundamental freedoms."

BIBLIOGRAPHY

Note: The United States National Park Service publishes a journal, CRM, devoted to cultural management activities, including examples of collaborative research between government agencies and indigenous peoples. Cultural Survival Quarterly, published by Cultural Survival, Inc. of Cambridge, Massachusetts, is a rich source of information on current development issues, including the control and marketing of heritage. Publications of particular relevance and usefulness to this study include:

An-Nalim, Abdullahi Ahmed, editor. Human Rights in Cross-Cultural Perspective, A Quest for Consensus, University of Pennsylvania Press, Philadelphia, 1992.

Albers-Schonberg, Georg. "The continuing importance of natural products for medicine", paper presented to the 2nd Princess Chulabhorn Science Congress, Bangkok, 2-6 November 1992.

Ayau, Edward Halealoha. Restoring the ancestral foundation of native Hawaiians: implementation of the Native American Graves Protection and Repatriation Act". In Arizona State Law Journal 24, 1992, pp. 193-216.

Bifani, Paolo. "The new mercantilism and the international appropriation of technology", Technology, Trade Policy and the Uruguay Round, UNCTAD/ITP/23, February 1990, p. 23.

Blalick, Michael. Palms, people and progress. In Horizons 3 (4), 1984, pp. 32-37.

Blalick, Michael. Ethnology and the identification of therapeutic agents from the rainforest. In D.J. Chadwick and J. Marsh, eds., Bioactive Compounds from Plants, 1990.

Cunningham, A.B. Indigenous knowledge and biodiversity. In Cultural Survival Quarterly, Summer, 1991, pp. 4-8.

Daes, Erica-Irene A. Working paper on the question of the ownership and control of the cultural property of indigenous peoples (E/CN.4/Sub.2/1991/34).

Dixon, Rod A. and Michael C. Dillon. Aborigines and Diamond Mining: The Politics of Resource Development in East Kimberley Western Australia, 1990.

Elisabetsky, Elaine. Folklore, tradition or know-how? Cultural Survival Quarterly, Summer, 1991, pp. 9-13.

Fenton, William N. Return of eleven wampum belts to the Six Nations Iroquois Confederacy on Grand River, Canada, Ethnohistory 36 (4): 392-410. 1989.

Francis, Daniel. The Imaginary Indian: The Image of the Indian in Canadian Culture. 1992.

Golvan, Colin. Aboriginal art and the protection of indigenous cultural rights. In Aboriginal Law Bulletin 2 (56): June 1992. The Federation Press in association with Golvan Arts. An introduction to intellectual property law.

Gray, Andrew, editor. Between the Spice of Life and the Melting Pot: Biodiversity Conservation and Indigenous Peoples, International Work Group of Indigenous Affairs. Document No. 70. 1991.

Greenfield, Jeannette. The Return of Cultural Treasures. 1989.

Healy, Kevin. Ethnodevelopment among the Jalqu'a of Bolivia. In Grassroots Development 16 (2): 22-24. 1992.

International Council of Museums. "Study of the Principles, Conditions and Means for the Restitution or Return of Cultural Property in View of Reconstituting Dispersed Heritages", in Museum 31 (1): 62-67. 1979.

Lazaro, Manuel, Mario Pariona and Robert Simeone. "A natural harvest", in Cultural Survival Quarterly (Spring 1993), pp. 48-51.

Lobo, Susan. "The fabric of life; repatriating the sacred Coroma textiles", in Cultural Survival Quarterly (Summer 1991), pp. 40-46.

Maddock, Kenneth. Copyright and traditional designs - An Aboriginal dilemma. In Aboriginal Law Bulletin 2 (34): 8-9. October 1988.

Moran, Katy. Ethnobiology and U.S. policy. In Mark Plotkin and Lisa Famolare, eds., Sustainable Harvest and Marketing of Rainforest Products, 1992.

Ono, Koichi. Protection of new or advanced biotechnology by intellectual property rights. In Worldwide Forum on the Impact of Emerging Technologies on the Law of Intellectual Property, WIPO, 1989.

Peterson, Kristin. Recent intellectual property trends in developing countries. In Harvard International Law Journal 33 (1): 277-290, 1992.

Pullar, Gordon L. The Qikertarmiut and the scientist: Fifty years of clashing worldviews. Paper presented at the American Anthropological Association, San Francisco, 3 December 1992.

Sackler, Elizabeth, Martin Sullivan and Richard Hill. Three voices for repatriation. In Museum News. September/October 1992. pp 58-61.

Seeger, Anthony. Singing other peoples' songs. In Cultural Survival Quarterly, Summer 1991. pp. 36-39).

United Nations. Report of the Secretary-General. Intellectual property of indigenous peoples (E/CN.4/Sub.2/1992/30).

United States Congress, Senate Select Committee on Indian Affairs. Native American Grave and Burial Protection Act. Senate hearing 101-952. 1990.

United States Congress, Senate Select Committee on Indian Affairs, Religious Freedom Act. Senate hearing 102-698. 1992.

United States Department of the Interior, National Park Service, Guidelines for the Identification and Evaluation of Traditional Cultural Properties. National Register Bulletin No. 38. 1992.

United States Department of the Interior, National Park Service, Keepers of the Treasures: Protecting Historical Properties and Cultural Traditions on Indian Lands. 1990.

United States Department of the Interior, National Park Service, Wounded Knee South Dakota: Draft Study of Alternative Environmental Assessment. January 1993.

United States National Institutes of Health, National Institute of Mental Health, National Science Foundation, and U.S. Agency for International Development, "International Cooperative Biodiversity Groups", RFA No. TW-92-01. (12 June 1992).

United States National Institutes of Health. Information workshop to discuss the request for application TW-92-01 "International Cooperative Biodiversity Groups". August 1992.

Vecsey, Christopher, editor. Handbook of American Indian Religious Freedom. 1991.